also testified that, when asked about taking Guidry's confession despite his having an appointed attorney, one of the officers stated that they had called Guidry's attorney and received permission to question Guidry about the capital murder charge. 3 SR 87; 7 SR 107-08, 140-41. Layton Dauer, Guidry's attorney on the aggravated robbery charge, testified that he never received a phone call from anyone at the Harris County Sheriff's Office seeking permission to speak with his client. 7 SR 102-03.

Deborah Gottlieb, a defense attorney (not appointed in this case) was the first to testify regarding this conversation. In her original testimony at the August 28, 1996, suppression hearing, Gottlieb stated that she had never seen the officers present in chambers before that day and did not know their names. 3 SR 80-81. However, when Detectives Roberts and Hoffman were brought into the courtroom, she identified them as the officers she had seen in chambers and further stated that she believed the "bigger one" (Detective Hoffman) was the one who had made the statement about calling Guidry's attorney. 3 SR 87-88, 95. In her subsequent testimony at the February 1997 suppression hearing, Gottlieb stated that she couldn't remember which one made the comment, but thought it was the "short one" (Detective Roberts). 7 SR 134.

Interestingly, Sylvia Yarborough and Richard Scott, who had not testified during the original suppression hearing, also identified Roberts as the officer involved in the conversation in Judge Kegan's chambers at the February 1997 hearing. 7 SR 105, 149. However, neither was aware of Detective Roberts' name at the time of the conversation and identified him only after he was singly brought into the courtroom.[8] Further, Yarborough could not

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[8] This is, of course, after Roberts had testified during the first hearing, in which Yarborough and Scott both participated as Guidry's attorneys, that he was one of the detectives who took Guidry's first written statement.

identify the second officer present, while Scott testified that it was Lieutenant Danny Billingsley. 7 SR 105, 149. Yarborough admitted during cross-examination that she, Gottlieb, and Scott had discussed the chambers conversation prior to their testimony. 7 SR 112.

Detective Roberts testified that he did not recall having a conversation in Judge Kegan's chambers with defense attorneys representing Guidry. 7 SR 203. He further averred that he never told Scott or anyone else that he had contacted Guidry's attorney requesting permission to question Guidry on the capital murder charge. 7 SR 203.[9]

The trial court found the State's witnesses more credible and denied the motion to suppress. Tr 423.[10] In its findings and conclusions on the motion, the trial court found that "at no time did [Guidry] indicate he wanted an attorney present to advise him." Tr 430. The court further concluded that Guidry's statements were voluntary and that his waiver of his rights was intelligent and knowing. *Id.* Accordingly, the court admitted these statements into evidence during trial.

On direct appeal, Guidry urged that his confessions were admitted in error. Specifically, he argued that the self-incriminating

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[9] Although neither Hoffman nor Billingsley were questioned during the suppression hearing in state court regarding whether they were present in chambers on the day in question, both denied such in their testimony at the federal evidentiary hearing.

[10] The trial court also held a hearing outside the presence of the jury during trial, at which each of the aforementioned defense witnesses again gave substantially the same testimony. 24 SR 246-288. The purpose of the hearing was to determine whether the evidence presented a question for the jury regarding the voluntariness of the confessions. 24 SR 289-90.

statements were taken in violation of his Fifth Amendment right to counsel. Citing *Edwards v. Arizona*, 541 U.S. 477, 484 (1981), the Court of Criminal Appeals recognized that

> once a suspect invokes his Fifth Amendment right to counsel, he cannot be further interrogated by the police until counsel has been provided for him, or unless the suspect himself reinitiates the interrogation. The invocation of an accused's Fifth Amendment right to counsel requires, at minimum, some statement that can be reasonably construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.

Guidry, 9 S.W.3d 133, 141-42 (Tex. Crim. App. 1999)(internal citations and quotations omitted). In analyzing this claim, the court noted that the record contained conflicting testimony as to whether Guidry requested his attorney during the interrogation. *Id.* at 142. Ultimately, the Texas court concluded that the trial court's findings were supported by evidence in the record, and deferred to these findings because "the trial court is in the best position to evaluate the credibility of witnesses and their testimony." *Id.*

Guidry also raised this claim in his state writ application. The state habeas court entered extensive factual findings relating to the testimony offered during the suppression hearings at trial. SHTr 129-138. Based on this testimony, the state habeas court concluded that "Guidry fail[ed] to show that his written statements were taken in violation of his right against self-incrimination and in violation of his right to counsel." SHTr 143. Based upon these findings and conclusions, the Court of Criminal Appeals again denied relief. *Ex parte Guidry*, No. 47,417-01 (Tex. Crim. app. 2000).

III. State and Federal Court Proceedings

Guidry was convicted and sentenced to death in March 1997 for the capital offense of murdering Farah Fratta for remuneration. Tr 393, 408-410. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence in a published opinion. *Guidry v. State*, 9 S.W.3d 133 (Tex. Crim. App. 1999). This Court denied certiorari review on October 2, 2000. *Guidry v. Texas*, 531 U.S. 837 (2000). Based upon findings of fact and conclusion of law by the state trial court, Guidry's state habeas application was rejected by the Court of Criminal Appeals on October 21, 1998. *Ex parte Guidry*, No. 47,417-01 (Tex. Crim. app. 2000).

Guidry filed his federal habeas petition was in November 2001. Following an evidentiary hearing, in which the district court heard the same testimony from the same witnesses who testified in the pre-trial suppression hearing, the court granted conditional federal habeas relief on Guidry's Fifth Amendment involuntary confession claim. *Guidry v. Dretke*, No. H-01-cv-440 (S.D. Tex. Sept. 26. 2003). On January 14, 2005, a divided Fifth Circuit panel affirmed that decision. *Guidry*, 397 F.3d. 306. With seven judges dissenting, the Director's application for petition for rehearing *en banc* was denied on October 25, 2005. Appendix B.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision affirming the district court's grant of federal habeas relief is in discord with federal habeas jurisprudence of this Court and other federal courts of appeals. First, the court of appeals' application of 28 U.S.C. § 2254(e)(1) to the state court's findings on Guidry's Fifth Amendment claim is at odds with well established precedent affording presumptive weight to implicit, as well as explicit factual determinations. The court of

appeals' decision authorizing the federal district court to ignore implicit credibility determinations by the state court creates an important and unresolved conflict between circuits. Certiorari should be granted in order to resolve this conflict and preserve the deference § 2254(e)(1) affords to state court credibility determinations.

Second, the court of appeals' failure to find an abuse of discretion in the district court's decision to grant an evidentiary hearing in the case also creates an important and unresolved conflict among federal courts. Current case law from both this Court and courts of appeals demands deference to state court credibility determinations. Allowing a federal district court to grant an evidentiary hearing for the sole purpose of reassessing the credibility of witness who already testified before the state trial court would severely undermine the deferential treatment of state court judgments on federal habeas review. As such, certiorari is warranted in this case.

I. The Court of Appeals' Decision Creates an Unresolved Conflict With the Decisions of This Court and Other Courts of Appeals Regarding the Application of 28 U.S.C. § 2254(e)(1) to Implicit Factual Findings By the State Court on Federal Habeas Review.

The Fifth Circuit overturned critical factual findings by the state trial court concerning the voluntariness of Guidry's confession because the trial court failed to make express observations concerning the credibility of certain witnesses. In so doing, the lower court ignored jurisprudence of this Court and other circuits, dictating that the presumption of correctness under § 2254(e)(1) applies, to not only explicit, but also implicit factual determinations by the state court. The decision in this case placed the Fifth Circuit at odds with well established federal authority enforcing the

deference afforded to state courts under the AEDPA. As a result, certiorari review should be granted to resolve this important conflict.

Guidry's Fifth Amendment claim was fully litigated in the state trial court during a pre-trial suppression hearing. The trial court heard several witnesses testify regarding whether or not Guidry had, in fact, invoked his right to counsel during his interrogation by police. Despite the fact that this claim was adjudicated on the merits in the state court, the federal district court granted an evidentiary hearing during which the *same* witnesses offered substantially similar testimony to that offered during the state habeas proceeding. By the district court's own admission, the hearing was granted to enable her to make her own determinations as to the witnesses credibility. *See* 3 R 109. For this reason the district court's subsequent grant of federal habeas relief on Guidry's Fifth Amendment claim cannot be squared with the AEDPA.

At issue in this case are the state trial court's factual findings that (1) Guidry never asked for an attorney to be present during his interrogation by police; and (2) there was nothing indicating that Guidry's decision to talk to police without his attorney present was anything other than a knowing and voluntary waiver of his constitutional rights. Because there was conflicting evidence in the record, the trial court's findings necessarily hinged upon its credibility assessment of the witnesses presented during the suppression hearing. Judge Garza aptly noted in his dissent in the court below,

[w]hether Guidry asked to speak to his attorneys necessarily turns on whose version of events the fact finder finds credible – Guidry or the detectives who questioned him. The credibility of the detectives' testimony, in turn, depends in part on the credibility of the three attorneys' recollection of the alleged in-chambers

conversation.

Guidry, 397 F.3d at 332 (J. Garza, dissenting).

The district court and the Fifth Circuit refused to accept the factual findings made by the state trial court in this instance because the trial court did not make express determinations concerning the credibility of the three attorneys present during the alleged in-chambers conversation and the attorney appointed to represent Guidry on an unrelated offense. With little analysis and no authority to support its position, the Fifth Circuit concluded that, because the testimony of these four lawyers was crucial to ascertain whether Guidry had in fact asked to speak to an attorney and whether the detectives had told Guidry they had spoken to his attorney and he indicated it was alright for Guidry to talk to the police, "[t]he district Court did not err in its application of subpart (e)(1)." *Guidry*, 397 F.3d at 326-27.

Thus, the lower court's opinion holds that deference to factual determinations by the state court is not required where the state court fails to explain how it resolved conflicts in the evidence. Alternatively, the opinion can be read to stand for the proposition that the absence of express findings may, in certain circumstances, constitute clear and convincing evidence to rebut the presumption of correctness § 2254(e)(1) attaches to state court factual determinations. In either instance, the Fifth Circuit stands in clear opposition to the deference mandated on federal habeas review.

The seven Fifth Circuit judges dissenting from the denial of the Director's petition for rehearing *en banc* correctly stated that "[g]ranting deference to the state courts' *implicit* and explicit historical factfindings...is in fact a bedrock principle of federal habeas jurisprudence." Appendix B at 10. Even before the AEDPA's heightened deferential scheme was enacted, this Court

recognized that implied factual findings by the state court warranted a presumption of correctness.[11]

In *Marshall v. Lonberger*, this Court addressed the Sixth Circuit's failure to afford proper deference to a state court factual finding. 459 U.S. 422 (1983). The issue in that case was whether Lonberger's guilty plea on a prior felony charge in Illinois was admissible at his Ohio murder trial. Before admitting this evidence, the Ohio state trial court conducted a hearing to determine whether Lonberger had intelligently and voluntarily pleaded guilty to the prior offense. Based on its review of the record and Lonberger's testimony, the court concluded that the guilty plea was valid and admissible at trial to prove Lonberger was death-worthy. *Id.* at 428-30. On federal habeas review, the Sixth Circuit granted relief after reassessing Lonberger's testimony during the state court hearing and finding it credible. *Id.* at 430-31.

The Court could not ascertain whether the Sixth Circuit had reassessed the effect of Lonberger's testimony because the Ohio state trial court failed to make an express finding as to his credibility or because the court felt it should assess for itself the weight such evidence should have been accorded by the state court. *Marshall*, 459 U.S. at 433. Either way, this Court held the circuit court failed to properly apply the presumption of correctness under

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[11] The Director's position is even more compelling given the enactment of the AEPDA in 1996. This Court has noted that the AEDPA places "new constraints on the power of a federal habeas court to grant a state prisoner's application for writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "Congress wished to curb delays, to prevent 'retrials' on federal habeas review, and to give effect to the state court convictions, to the extent possible under law." *Id.* at 386 (Opinion of Stevens, J.). Certainly, an opinion authorizing the "retrial" of the suppression hearing by a federal habeas court to redetermine witness credibility creates a significant conflict with this Court's AEDPA jurisprudence.

former § 2254(d). *Id.*

Relying upon *Lavalle v. Delle Rose*, 410 U.S. 690 (1973), the Court explained that the Ohio state trial court's ruling allowing the admission of evidence concerning Lonberger's prior guilty plea was tantamount to an express finding that Lonberger's testimony at the hearing was not credible. *Marshall*, 459 U.S. at 433-34. Thus, the failure of the state court to make an explicit determination regarding Lonberger's testimony did not authorize reassessment of his credibility on federal habeas review. *Id.* The state court's implicit finding was entitled to a presumption of correctness under former § 2254(d). *Id.*

This principle has been routinely adhered to across the circuits in adjudicating federal habeas petitions. *Ventura v. Meachum*, 957 F.2d 1048, 1054 (2nd Cir. 1992)("Section 2254(d) [pre-AEDPA] requires federal courts to accord deference to implied as well as express findings of facts."); *Campbell v. Vaughn*, 209 F.3d 280, 285-86 (3rd Cir. 2000)("In interpreting [28 U.S.C. § 2254(e)(1)] the Supreme Court has held that an implicit finding of fact is tantamount to an express one, such that deference is due to either determination."); *Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir. 2000) ("The presumption of correctness accorded to state court findings...applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility.")(internal quotation and citations omitted); *Sprosty v. Buckler*, 79 F.3d 635, 643 (7th Cir. 1996) ("...[T]he presumption that a state court's factual determinations are correct applies not only to the state court's factual findings, but also to the implicit resolution of a factual dispute that can be fairly inferred from the state court record. The resolution of a factual issue that involves a state trial court's evaluation of the credibility and demeanor of witnesses is one that is afforded particular deference.")(internal citations and quotations omitted); *Crespo v.*

Armontrout, 818 F.2d 684, 686 (8th Cir. 1987) ("We must defer to the [state court's] implicit finding that Crespo never invoked his right to counsel before making his first oral statement. Section 2254(d)'s [pre-AEDPA] presumption of correctness also applies to factual findings necessarily implicit in a state court's resolution of an issue so long as it is clear that the state court applied the correct legal standard."); *Steele v. Young*, 11 F.3d 1518, 1520 n. 2 (10th Cir. 1003) ("Explicit and implicit findings of historical fact by the state trial and appellate courts are presumed correct."). Thus, the decision in this case stands in opposition with the Second, Third, Sixth, Seventh, Eighth, and Tenth Circuits.

Indeed, prior to the decision announced in this case, the Fifth Circuit also followed this principle. *See e.g. Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mix law and fact.")(citing *Marshall*, 459 U.S. at 344); *Young v. Dretke*, 356 F.3d 616, 628-29 (2004) ("As a federal habeas court, we are bound by the state habeas court's factual findings, both implicit and explicit."); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003). In refusing to rehear this case, the Fifth Circuit has abandoned its adherence to this rule of federal habeas law.

The primary issue in adjudicating Guidry's Fifth Amendment claim was whether Guidry had, in fact, asked to speak to his attorney during the interrogation. The question could not be settled without making difficult credibility determinations. Guidry testified and maintained that he had asked for his attorney to be present during the interview, while the detectives stated the opposite. The state trial court also had to consider the testimony of the lawyers present during the alleged in-chambers conversation and determine the extent to which their testimony called into

question the credibility of the detectives who interrogated Guidry.

Ultimately, the state trial court chose to believe the detectives and found that "at no time did [Guidry] indicate he wanted an attorney present to advise him." Tr 430. The court of appeals held that the district court did not err in failing to afford deference to the state court's findings on this issue because, while the trial court's findings expressly weighed the testimony of Detective Roberts and Sergeant Hoffman against Guidry's testimony, the court omitted mention of the attorneys' testimony. *Guidry*, 397 F.3d at 327. However, in rejecting Guidry's assertion that he had asked for an attorney to be present, the trial court implicitly found that the attorneys' testimony regarding the alleged in-chambers conversation did not sufficiently refute the testimony by Detective Roberts and Sergeant Hoffman.[12]

That implicit finding was entitled to a presumption of correctness under § 2254(e)(1), and the burden fell upon Guidry to prove by clear and convincing evidence that it was incorrect. In holding that the absence of certain, express factual findings by the state court may alleviate a petitioner's burden of rebutting the presumption of correctness by clear and convincing evidence, the Fifth Circuit's opinion in the case contradicts federal authority and, left uncorrected, will impact the face of federal habeas corpus jurisprudence. Certiorari review should be granted here to resolve this conflict and preserve the deference the AEDPA affords to state court factual findings under § 2254(e)(1).

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[12] The trial court did not simply ignore the testimony of the attorneys' in question. At the close of the suppression hearing, the trial court explicitly acknowledged that their testimony was relevant to determine the credibility of Guidry and the detectives. 7 SR 212.

II. The Lower Court's Determination That the District Court Had Not Abused Its Discretion by Granting an Evidentiary Hearing in This Case Is Contrary to Established Federal Law.

The Fifth Circuit held that the district court was well within the AEDPA's boundaries to conduct an evidentiary hearing in this case. However, this decision cannot be squared with the federal statute or precedent from this Court interpreting such. Because this ruling creates a conflict with the deference demanded by the AEDPA, certiorari review should be granted in this instance.

The issue of whether Guidry had been interrogated by police in violation of his Fifth Amendment right to counsel was fully litigated in the state trial court. Specifically, the trial court held a pre-trial hearing to determine whether Guidry had, in fact, invoked his right to counsel during questioning. Extensive testimony was offered by both parties during this hearing, and several witnesses, including some of the police officers, testified on more than one occasion.

The only reason a federal evidentiary hearing was held in this case was to allow the district court the opportunity to redetermine the credibility of the witnesses who had testified previously before the state trial court:

The only thing I said in the last order [denying summary judgment] was, I just don't think I can do it right now. I need to be able to make some credibility determinations on my own and figure out what's going on. Now that I've heard the evidence, I guess it's time for me to basically look at the same issues again but with a little more knowledge.

3 R 109. Later in its opinion and memorandum granting relief on

Guidry's Fifth Amendment claim, the district court stated, "Here the Court's credibility evaluation focuses not on the cold record, but on the same live witnesses, and presumptively the same demeanor, as was presumably considered by the trial court." R 508-509.

As previously discussed, the state trial court's implied credibility determinations are findings of fact entitled to a presumption of correctness under § 2254(d)(1). *See also Miller v. Fenton*, 474 U.S. 104, 114 (1985) ("When...the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for...according [the trial court's] determinations presumptive weight); *Sumner v. Mata*, 455 U.S. 591, 597 (1982)[13] (explaining that federal habeas courts must defer to state court on questions involving the credibility of witnesses). It is, therefore, untenable that the district court could grant a hearing on federal habeas review for the sole purpose of assessing the credibility of the same witnesses appeared before the state trial court. To allow such would eviscerate much of the deference afforded state court decisions by the AEDPA.

Furthermore, as argued by the judges dissenting to the denial of rehearing *en banc*,

[T]he panel majority's approval of this redundant hearing cannot be reconciled with AEDPA's requirement that the reasonableness of the state court factfindings must be assessed "in light of the evidence presented in the state court proceedings."

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[13] Although the Director challenged the district court's discretion to grant an evidentiary hearing in the Fifth Circuit, he did not, as noted by Judge Barksdale in his comments regarding the Dissent of Denial for Rehearing *En Banc*, not raise this particular argument to support that challenge. Regardless, the absence of this argument below does not preclude this Court from granting certiorari review on the question presented.

Appendix B at 8 (citing *Holland v. Jackson*, 542 U.S. 649 (2004) ("whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it.*) (emphasis added). As the dissent noted, allowing the current decision to stand would afford a federal habeas court the discretion to, in any number of situations, retry historical issues of fact simply to reassess witness credibility. *Id* at 9. "Any number of [] examples could be advanced, but in all such cases, the federal court would be displaying the opposite of deference to state court procedures and decisions from that mandated by the AEDPA." *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari in order to resolve the important and conflicts between the decision of the lower court and well established federal habeas jurisprudence.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,Fifth Circuit.
Howard Paul GUIDRY, Petitioner-Appellee,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellant.
No. 03-20991.

Jan. 14, 2005.

Kenneth A. Williams (argued), Gonzaga University School of Law, Spokane, WA, Robert M. Rosenberg, Wilton Manors, FL, for Petitioner-Appellee.
Tina J. Dettmer (argued), Austin, TX, for Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before BARKSDALE, GARZA and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:
Howard Paul Guidry was convicted in Texas state court of murder for remuneration in Harris County, Texas, and sentenced to death. He was granted conditional federal habeas relief based on the following two claims, involving evidence admitted for the State at trial: his confession violated his Fifth Amendment right against self-incrimination; and hearsay testimony against his interest violated his Sixth Amendment confrontation right. The Texas Court of Criminal Appeals had denied those claims on direct appeal. *Guidry v. State*, 9 S.W.3d 133 (Tex.Crim.App.1999), *cert. denied*, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000) (*Guidry I*). In denying Guidry's Sixth Amendment claim, the Court of Criminal Appeals had held: although the hearsay testimony against Guidry's interest had been admitted erroneously, the error was harmless. *Id.* at 149-52.

The State contends the district court reversibly erred because: (1) under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), the district court abused its discretion by conducting an evidentiary hearing on the confession's constitutionality, despite the state trial court's having done so for the same issue, involving, according to the State, the same evidence; (2) the district court's non-acceptance of key state court findings of fact and, therefore, of its conclusions of law, did not accord with AEDPA's deferential scheme; and (3) the district court's findings of fact and conclusions of law regarding the confession and hearsay testimony (that their admission into evidence was erroneous and did *not* constitute harmless error) are erroneous.

The district court properly granted conditional habeas relief, pursuant to 28 U.S.C. § 2254(d) (state court decision was based on unreasonable application of clearly established federal law or on unreasonable determination of the facts). AFFIRMED.

I.

Farah Fratta was murdered on 9 November 1994; her husband, Robert Fratta, had hired Joseph Prystash to kill her. (Each received the death penalty.) During a custodial interrogation approximately four months after Farah Fratta's murder, Guidry confessed to shooting Farah Fratta and leaving the scene with Prystash. At Guidry's trial, his confession, as well as hearsay testimony against Guidry's interest by Prystash's girlfriend, Mary Gipp, established that, for $1,000, Guidry agreed to help Prystash kill Farah Fratta. The events surrounding this crucial evidence follow.

Guidry was arrested on 1 March 1995 for bank robbery; in his possession was the gun used for Farah Fratta's murder in November 1994. Following a tip from Gipp, detectives investigating Farah

Fratta's murder turned their investigation toward Guidry, who was being held at the county jail on the robbery charge.

On 7 March 1995, Detectives Roberts and Hoffman transported Guidry from the jail to the Sheriff's office and questioned him about Farah Fratta's murder. As a result of this interrogation, Guidry gave a statement confessing to it. (He initially confessed to being only the driver, failed a polygraph test, and confessed to being the shooter.) This statement was followed by more detailed, videotaped confessions. (Guidry and the detectives offer sharply contrasting versions of the interrogation leading to the confession.)

Guidry was indicted for the murder of Farah Fratta "for remuneration or the promise of remuneration". TEX. PENAL CODE § 19.03(a)(3). After two pre-trial evidentiary hearings, the trial court denied Guidry's motion to suppress the confession. In March 1997, a jury found Guidry guilty of capital murder and, following the punishment phase, answered Texas' special issues in a manner requiring imposition of a death sentence. For the two fact-intensive claims on which conditional federal habeas relief was granted, an extremely detailed description of the proceedings in state and federal court is required.

A.

Central to Guidry's claim that his confession was obtained in violation of the Fifth Amendment are two events: Guidry's 7 March 1995 interrogation and confession; and an in-chambers conversation approximately a week later (15 March), involving, among others, Detective Roberts and Guidry's then-attorneys for the murder charge. These events bear on the two key questions for the Fifth Amendment claim: (1) whether Guidry asked to have his robbery-charge-attorney present during the 7 March interrogation about Farah Fratta's murder; and (2) whether the detectives told

Guidry, untruthfully, that Guidry's robbery-charge-attorney had authorized Guidry's cooperation without his attorney's being present. The detectives deny Guidry requested an attorney and deny that they spoke with his robbery-charge-attorney; they claim Guidry confessed voluntarily.

The trial court held a pre-trial hearing on 28 August 1996 on Guidry's motion to suppress the confession; it was continued when it became apparent that Guidry's two attorneys for the murder charge would be required to testify about the 15 March 1995 in-chambers conversation. A second pre-trial hearing was held on 20 February 1997, involving the same witnesses, but adding testimony by Guidry and his two original/former attorneys for the murder charge. Following this hearing, the trial court orally denied the suppression motion; post-jury verdict, it entered written findings of fact and conclusions of law on 27 March 1997. Those findings and conclusions, as well as the testimony at the two pre-trial hearings about the interrogation and in-chambers conversation, follow.

1.

At the 1997 pre-trial hearing, Guidry testified about the 7 March 1995 interrogation. (As noted, he did not testify prior to the initial hearing's being continued in 1996.) According to Guidry: his robbery-charge-attorney, Duer, instructed him not to discuss anything with anyone (including officers and other prisoners); Detectives Roberts and Hoffman removed him from the county jail and transported him to their offices for interrogation; Detective Hoffman questioned him initially, left the room, and returned with Detective Roberts; Detectives Roberts and Hoffman then confronted Guidry with pictures of Farah Fratta's body; this frightened Guidry; *he requested his attorney;* and Detective Hoffman refused, while Detective Roberts remained silent.

Guidry testified further: the detectives left him alone for around one and a half hours; then, Detective Hoffman returned, saying he had a statement from Prystash implicating Guidry; the detective gave the statement to Guidry to read and claimed he had other evidence as well, but that they could work out a deal if Guidry cooperated. Guidry testified:

And this is all while I was reading the statement [by Prystash]. After I got through reading the statement, I asked [Detective Hoffman] again, I-I really didn't ask him, *I kind of demanded that I speak to my lawyer that second time,* because I was-I was really getting scared after the second time ....

And when I told him that, he told me he was going to contact my attorney. At that point in time, he picked up the statement and he left ... the room.

(Emphasis added.) Guidry testified that Detective Hoffman... asked me before he left ... the room-*when I asked him for my attorney the second time, he asked me who my lawyer was.* And I told him Mr. Layton Duer.

And he said: I'm going to contact your attorney and we're going to see what he says, right. And he stayed in the room maybe a minute getting paperwork together, and he left ... the room.

(Emphasis added.) According to Guidry, after some time passed, Detectives Roberts and Hoffman returned, saying they had contacted Guidry's attorney.Detective H[o]ffman ... told me he had contacted my attorney.

He told me my attorney said it was all right for me to answer the question, and don't worry about it, you know, it was no problem.

Following this claimed exchange, and in claimed reliance on the alleged conveyed authorization from his attorney, Guidry gave his initial confession.

At the 1996 (first) pre-trial hearing, Detective Roberts offered conflicting testimony about knowledge of Guidry's representation.
Q. Were you aware of the fact that he, in fact, had an attorney representing him out of the bank robbery?
A. Somewhere, *subsequent in the conversation,* I was advised that he *did* have an attorney for the aggravated robbery.

(Emphasis added.) But later in the hearing, Detective Roberts retreated from his Guidry-had-counsel acknowledgment.A. ... *I don't know if he had an attorney or not.* I was, I assumed he, I don't know, he didn't tell me. I don't know how, *whether he had been in jail and had been appointed an attorney* [for the bank robbery charge], I *never did confirm* if he had an attorney.
Q. *So now you are going back to say you didn't even know he had an attorney?*
A. *Just because somebody's lips move doesn't make it a prayer book. I never did confirm whether there was an attorney or not.*
Q. So when he told you he had an attorney, you assumed he was lying, right, so it wasn't a prayer book?
A. I'm not aware of how I was made aware of it, if he had an attorney or not.

(Emphasis added.)

When asked whether he had contacted Guidry's attorney at any time for any purpose, Detective Roberts answered: "I don't *think* I did". (Emphasis added.) He also denied that Guidry requested either to speak with his attorney or to have him present.

At the 1997 (second) pre-trial hearing, Detective Roberts gave the following testimony regarding his knowledge of Guidry's representation at the time of the 7 March 1995 interrogation:
Q. For the record, today, tell us what you knew about who Howard Guidry's attorney was or what information you had at the time the

conversation took place between you and him on March the 7, 1995?
A. *I had no knowledge that he had an attorney.*
...
Q. At any time during your conversation with ... Mr. Guidry, either by Detective Hoffman or anybody else in the interview room that date on March 7, 1995, did you learn that Howard Guidry did, in fact, have an attorney on the Klein Bank robbery?
A. No, sir.

(Emphasis added.) Later in the hearing, however, Detective Roberts contradicted this testimony, returning toward his original position at the 1996 pre-trial hearing. This testimony was even more favorable to Guidry because Detective Roberts admitted Guidry told him that he (Guidry) had an attorney.Q. Did [Guidry] ever tell you he had an attorney?
A. *Yes, sir.*
Q. But he never told you he wanted to talk to that attorney?
A. That's correct.

(Emphasis added.)

Detective Hoffman also testified at the 1996 and 1997 hearings: he read Guidry his *Miranda* rights several times, beginning during the transport from the county jail; Guidry was very cooperative and voluntarily waived his rights and confessed; Detective Hoffman did not know for what offense Guidry had been incarcerated in the county jail; he did not know that Guidry had an attorney for that offense; *Guidry never asked to have his attorney present during the interrogation or confession;* and neither he nor Detective Roberts ever returned to the interrogation room saying they had spoken with Guidry's attorney and that he had authorized Guidry's cooperation.

Sergeant Dan Billingsley, the supervising detective on duty at the

Sheriff's office the night of the interrogation, witnessed some of the confession. He testified that, although he was sure he knew Guidry had an attorney, he was not sure when he became aware of that fact.

2.

At the 1996 (first) hearing, Gottlieb, a lawyer unaffiliated with the Guidry case, gave the following testimony about a 15 ***313** March 1995 conversation in the chambers of a Texas state judge (approximately a week after the interrogation/confession). The judge was not present; the following persons were: Gottlieb; Guidry's two attorneys for the murder charge, Scott and Yarborough; Assistant District Attorney Rizzo; and two Harris County Sheriff's detectives. During this conversation, one of the detectives remarked that he had been involved in obtaining Guidry's confession for the investigation of Farah Fratta's murder.

Scott and Yarborough, who had been appointed on or about that very day to defend Guidry on the murder charge, asked about the circumstances under which Guidry confessed. Gottlieb testified about the detectives' response.

Q. Was there any discussion [by the detectives] about whether or not Howard Guidry had an attorney?

...

A. ... I think I said something to the effect that well, you know, he has an attorney on the aggravated robbery. They said, *Yes, we talked to the attorney and got permission to talk to Mr. Guidry before we took him out to have his statement.* ...

[W]e all looked at each other in total and complete amazement ... I mean we were shocked that that would have occurred....

That the lawyer gave them permission to talk to a man being accused of capital murder ... [that a] defense attorney would even do that. I mean I specifically remember elbowing ... Yarborough, going, Who is that [lawyer?]

(Emphasis added.)

Duer, Guidry's robbery-charge-attorney, also testified at the *1996 hearing.* According to his testimony: he told Guidry not to talk to any officers; he was never contacted by any detectives or by anyone else; and he never gave anyone permission to discuss any matter with Guidry.

Detectives Hoffman and Roberts and Sergeant Billingsley testified, as discussed *supra,* after Gottlieb and Duer at the 1996 hearing. At this point in the hearing, Guidry's murder-charge attorneys (Scott and Yarborough) realized that, because the detectives had contradicted Gottlieb's account of the 15 March in-chambers conversation, they (Guidry's murder-charge attorneys) would be required to testify about that conversation as participants in it. Therefore, they moved for a continuance so they could withdraw and new counsel could be appointed to represent Guidry. The motion was granted.

At the 1997 hearing, Gottlieb again testified regarding the 15 March in-chambers conversation. *Scott and Yarborough* also testified about it.

Yarborough testified that, the day before her testimony at the 1997 hearing, she had checked and determined that the State's case against Prystash was on the docket on the day of the 15 March in-chambers conversation (the reason for some or all of the persons being in the chambers). During that in-chambers conversation, according to Yarborough, Scott asked Detective Roberts why he interrogated Guidry, obtaining a confession, when he knew Guidry had a lawyer, and Detective Roberts responded: "I talked to his lawyer, and his lawyer said it was okay to talk to him". Yarborough testified she was absolutely sure this is what Detective Roberts said, and that she had reacted with shock.

Scott testified as follows

A. The response [from Detective Roberts and the other detective] was that they knew [Guidry] had an attorney at the time they took the statement, but they had checked with that attorney and got permission to go ahead and talk to Howard Guidry.

Q. Now, just so that the record is clear. Did the officer indicate to you that he talked with the attorney on the aggravated robbery case and got permission to take the confession in the capital case?

A. Yes, sir. He said that he knew [Guidry] had an attorney-referring to the other attorney and that ... they had called and gotten permission from that attorney to talk to Mr. Guidry before they took the statement in the capital murder case.

The *Dissent* at 332 notes that Scott testified Detective Roberts might have been joking at the in-chambers conversation. This is a critical point. Indeed, Scott testified he had thought Roberts had been joking then; his opinion changed totally at the 1996 hearing when Roberts' testimony constituted a total denial of any in-chambers conversation, *not* that he had just been joking. Again, this is what caused Scott and Yarborough to realize at the 1996 hearing that they would have to withdraw as Guidry's counsel and testify.

Scott and Yarborough testified further: they immediately determined that Duer had been Guidry's robbery-charge-attorney; and, when they contacted him, he stated he had never had any such conversation with the detectives. As he had in 1996, *Duer* testified at the hearing in 1997 that "[n]o one has ever contacted me about speaking to Mr. Guidry".

Detective Roberts had testified at the start of the 1997 hearing. He was recalled after Scott and Yarborough testified. He was then questioned about this 15 March in-chambers conversation. *Detective Roberts testified he had no recollection of its having*

occurred.

3.

The pre-trial suppression motion was denied orally on 20 February 1997. Just before doing so, the state court stated that, for purposes of ruling on the admissibility of Guidry's confession, the 15 March in-chambers "conversation was absolutely meaningless, *except as it relate[d] to credibility*". (Emphasis added.)

Concerning credibility, when the first lawyer (Gottlieb) testified at the 1996 hearing, the trial judge asked counsel for both sides if they waived her being sworn, noting that, although she had "not [been] a long time member of the bar", she was "experienced". After counsel agreed to the waiver, the trial court stated: "Ms. Gottlieb, we trust you". Thereafter, however, at the 1996 and 1997 pre-trial hearings and in the light of Gottlieb's testimony at the 1996 hearing about the 15 March 1995 in-chambers conversation, the lawyers testified under oath.

In admitting Guidry's confession at trial, the state court on 20 March 1997 summarized the testimony given by Gottlieb, Scott, and Yarborough about the 15 March 1995 in-chambers conversation. That summary reflected the critical nature of the testimony by those lawyers, including the crucial credibility question presented by the trial judge at the conclusion of the 20 February 1997 pre-trial suppression hearing. In ruling that the admissibility of Guidry's confession was a question for the court, not the jury, the state court did not comment, however, about the credibility of the testimony by Gottlieb, Scott, or Yarborough.

Post-verdict, the trial court on 27 March 1997 entered written findings of fact and conclusions of law concerning the confession, including the following:

At all times Guidry advised [Detective] Tonry [a third detective] in

Hoffman's presence that Guidry understood what his rights [were], *never requested to have an attorney,* never asked to call his attorney, never desired his attorney, never refused to discuss the case without his attorney.
And, as a result, Guidry continued voluntarily discussing his complicity in the ... murder for hire with Detectives Hoffman and Tonry.
... [T]he statements were voluntarily made, not induced by force, threats or coercion, nor were any promises made, *nor was anything done to induce [Guidry] or cause [Guidry] to make anything but a knowing and intentional waiver of his rights and a free and voluntary decision to confess.*

(Emphasis added.)

These findings and conclusions, however, did *not* reconcile the testimony of Detectives Roberts and Hoffman with that of lawyers Duer, Gottlieb, Scott, and Yarborough. Indeed, notwithstanding the state court's above-discussed comments at the conclusion of the 1997 pre-trial suppression hearing and at trial, there was no mention of the lawyers' testimony from either of the two pre-trial evidentiary hearings, including the 15 March 1995 in-chambers conversation involving the detectives and the lawyers. With the exception of Guidry's testimony, the findings and conclusions did *not* evaluate the credibility of any defense testimony.

In evaluating Guidry's testimony, the trial court placed emphasis on Guidry's cooperation with law enforcement officers when Guidry had been arrested for other offenses, including for one offense for which he had claimed only to be the driver. (As noted *supra,* he had also made that claim in his initial confession concerning Farah Fratta's murder.)

Guidry admitted to having made a confession to the police

regarding the Klein Bank robbery prior to [the] March 7 [interrogation] mentioned above. Guidry also testified that as a 16 year old arrested for a number of burglaries he also confessed[;] additionally, Guidry had admitted to having confessed to certain other offenses (although not in writing) *and has admitted under oath to habitually being cooperative with police ... upon his arrest regarding his complicity in offenses.* Additionally, in another offense Guidry also claimed to *have been less culpable in that he was the driver as opposed to not being the trigger man* (a factor that did not go unnoticed by the trial Court in assisting its determination as to *Guidry's credibility and motive*).

(Emphasis added.)

B.

Guidry's direct appeal to the Texas Court of Criminal Appeals raised 23 issues, including claims that: (1) the trial court's findings and conclusions failed to address conflicts in the evidence concerning the voluntariness of his confession; (2) it was obtained in violation of the Fifth Amendment because he invoked his right to counsel; and (3) Gipp's hearsay testimony was admitted in violation of his Sixth Amendment confrontation right.

Concerning the absence of findings on either conflicting testimony or inconsistencies in the testimony, the Court of Criminal Appeals held that, although TEX.CODE CRIM. PROC. art. 38.22 § 6 requires specific findings of fact when the voluntariness of a confession is raised, *see, e.g., Hester v. State,* 535 S.W.2d 354, 356 (Tex.Crim.App.1976), "the trial court's findings were sufficiently detailed". *Guidry I,* 9 S.W.3d at 142. It reasoned that the trial court is required to provide facts supporting its conclusions but is *not* required by Texas law to outline testimony that *does not* support those conclusions. *Id.* In this light, the court rejected Guidry's Fifth Amendment claim, holding: "There is evidence in the record

supporting these findings. Because the trial court is in the best position to evaluate the *credibility of the witnesses and their testimony,* we defer to the trial court's findings [that Guidry did *not* request his attorney]". *Id.* at 143 (emphasis added).

Concerning Gipp's testimony about Prystash's statements implicating Guidry in the murder, the Court of Criminal Appeals rejected Guidry's inadmissible-hearsay claim. Although it ruled that some of Gipp's hearsay testimony was admissible, the court held that her testimony relating to Prystash's statements against Guidry's interest was inadmissible. *Id.* at 149. Nevertheless, it held the admission of that testimony was harmless error because, given the strength of Guidry's confession and the other evidence, Guidry would have been convicted and sentenced in the same way, even without Gipp's inadmissible testimony. *Id.* at 152.

In May 2000, Guidry filed a habeas petition in state court raising, *inter alia,* Fifth and Sixth Amendment claims. That July, without an evidentiary hearing, the state habeas court adopted verbatim the State's proposed findings of fact and conclusions of law and recommended denial of Guidry's petition on all claims.

Unlike the trial court's findings, the state habeas court's findings included reference to Gottlieb's and Duer's testimony at the 1996 evidentiary hearing. But, although the findings observe that the 1996 hearing was continued so that Scott and Yarborough (Guidry's then-counsel for the murder charge) could testify, they omit all reference to the 1997 pre-trial evidentiary hearing. Restated, there is no discussion of the testimony from the 1997 hearing, including by Scott and Yarborough. Moreover, there is no attempt to reconcile conflicting testimony between Detectives Roberts and Hoffman on the one hand and lawyers Duer, Gottlieb, Scott and Yarborough, on the other. Indeed, the findings make no credibility determinations; they do not weigh any witness' version of events

against another's.

The state habeas court concluded: "[Guidry's] claims concerning the voluntariness of his statements were raised and rejected on direct appeal. As such, the issue need not be considered in the instant writ proceeding or in any subsequent proceedings". In the alternative, it concluded that Guidry had failed to show his confession violated his right against self-incrimination.

In November 2000, based on its review of the record, the Court of Criminal Appeals ruled that the habeas trial court's findings and conclusions were supported by the record. On that basis, it denied habeas relief.

Guidry filed his federal habeas petition in November 2001, raising four grounds for relief, including the Fifth and Sixth Amendment claims at issue here. In his petition, Guidry requested an evidentiary hearing.

In a joint answer and motion for summary judgment, the State did not explicitly address Guidry's request for an evidentiary hearing. Instead, it provided, *inter alia,* a summary of AEDPA's standards for habeas relief as they related to Guidry's claims, including, pursuant to 28 U.S.C. § 2254(e)(1), the presumption of correctness to be accorded state court determinations of fact, unless rebutted by clear and convincing evidence, and how, pursuant to 28 U.S.C. § 2254(e)(2), an evidentiary hearing can be barred.

In an extremely detailed and comprehensive opinion, the district court denied the State's summary judgment motion and ordered an evidentiary hearing for the voluntariness *vel non* of Guidry's confession. *Guidry v. Cockrell*, No. H-01-CV-4140 at 9 (S.D.Tex. 11 Sept. 2002) (*Guidry II*). Concerning both why summary judgment could not then be granted and why an evidentiary hearing

was required, the district court stated that the confession issue comes before the Court under the deferential review afforded state factual findings. Such findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). Guidry may rebut the presumption of correctness by clear and convincing evidence. Having extensively reviewed the facts of this case, this Court is unable to grant Respondent's summary judgment motion at this time. Substantial factual questions persist surrounding Guidry's confessions. *The state courts made no attempt to evaluate the veracity of the attorney testimony or analyze its implication in this case. The state courts made no specific finding with respect to the inconsistent and contradictory testimony by the police officers.* If the allegations in Guidry's petition, as corroborated by the attorneys' testimony, are true, the reasonableness of the state court decision is suspect. [*See* 28 U.S.C. § 2254(d), discussed *infra.*] For this Court to fully evaluate the circumstances surrounding this claim, further factual development is appropriate. Factual development would aid this Court in determining whether clear and convincing evidence rebuts the trial finding that Guidry did not request counsel. Also, the factual development would clarify the ultimate question of the reasonableness of the state court's determination. *See Valdez v. Cockrell,* 274 F.3d 941, 952 (5th Cir.2001) ("When a district court elects, in instances *not barred by § 2254(e)(2),* to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)."). To that end, the Court will hold an evidentiary hearing limited to the issue of Guidry's Fifth Amendment claim.

Id. at 12-13 (emphasis added; footnote omitted). Concomitantly, the district court ruled that an evidentiary hearing was *not* barred by 28 U.S.C. § 2254(e)(2), discussed *infra.* *Id.* at 13 n. 12.

The State did not file a motion seeking to have the district court

reconsider its decision to conduct an evidentiary hearing. Nor did it oppose Guidry's motion for a continuance of that hearing from 1 November 2002 to 13 December 2002.

At the hearing, Guidry and lawyers Duer, Gottlieb, Scott, and Yarborough gave substantially the same testimony they had given in the state pre-trial evidentiary hearings. Similarly, Detective Hoffman gave the same testimony, adding that he had never been in the chambers where the 15 March 1995 conversation took place. Sergeant Billingsley also provided substantially the same testimony.

On the other hand, Detective Roberts' testimony, although similar in most respects to his previous testimony, included some significant differences: at the time of Guidry's interrogation on 7 March 1995, he did *not* know Guidry had an attorney; he *did* recall the 15 March 1995 in-chambers conversation (*a direct contradiction of his 1997 pre-trial testimony*); and he never told Scott in that conversation that he had contacted Duer, Guidry's robbery-charge attorney. *For the first time,* Detective Roberts testified, on direct examination, that, prior to questioning Guidry, he had contacted an attorney-Assistant District Attorney Wilson-to ask if he could question Guidry about the murder, because he knew that, based on Guidry's having been in jail several days on another charge, he probably had an attorney.

Q Let me back up just a little bit. I am sorry. Prior to interviewing Mr. Guidry, did you contact any attorney?
A Yes, I did.
Q Who did you contact?
A I contacted Ted Wilson with the Harris County District Attorney's Office.
Q Why did you contact Mr. Wilson?
A Just to ask him if there was a problem with me talking to Howard Guidry concerning this capital murder.

Q And why did you think there might be a problem with talking to him?
A *I knew he had been in jail for several days; and usually after a suspect has been in jail for two or three days, an attorney is appointed to them in most cases.*
Q So you knew it was possible that he might have an attorney?
A *It was possibly that he may have an attorney, and I wanted to make sure there wasn't a conflict, there was no problem.*

(Emphasis added.) Along this line, on cross-examination, Detective Roberts testified that Guidry *may* have told him during the interrogation that he *did* have an attorney.

In September 2003, the district court granted conditional habeas relief on Guidry's claims under the Fifth Amendment (involuntary confession) and Sixth Amendment (improper hearsay testimony). *Guidry v. Dretke*, No. H-01-CV-440 (26 Sept. 2003) (*Guidry III*). In so doing, the district court stayed its judgment pending appeal.

II.

At issue is whether the district court reversibly erred: (1) by conducting an evidentiary hearing on Guidry's confession, in the light of the state court's having held one for that issue and, according to the State, for the same evidence and in order to substitute its credibility determinations for those by the state court; (2) by ruling on that confession issue that, pursuant to 28 U.S.C. § 2254(e)(1), Guidry, with the requisite clear and convincing evidence, rebutted the presumption of correctness AEDPA accords to state court determinations of fact; and (3) by ruling that the admission of the confession and the hearsay testimony against Guidry's interest was *not* harmless error. We hold that the district court applied AEDPA properly both in conducting the hearing and in granting Guidry conditional habeas relief.

A.

[1] "AEDPA's purpose [is] to further the principles of comity, finality, and federalism." *Michael Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Toward that end, its enactment in 1996 effected considerable limitations on federal habeas review. That change, however, does not compel the narrow reading given AEDPA by the State (and the dissent) in regard to the district court's conducting an evidentiary hearing and applying 28 U.S.C. § 2254(e)(1).

1.

The trial court held pre-trial evidentiary hearings in 1996 and 1997 on the voluntariness *vel non* of Guidry's confession; the state habeas court did not conduct a hearing; and the district court held an evidentiary hearing on the same issue in 2002. The State does *not* contend that AEDPA expressly bars the district court hearing; instead, consistent with the abuse of discretion***319** standard of review for this issue, it contends that the district court abused its discretion by conducting the hearing. *See, e.g., Valdez v. Cockrell*, 274 F.3d 941, 948, 952 (5th Cir.2001), *cert. denied*, 537 U.S. 883, 123 S.Ct. 106, 154 L.Ed.2d 141 (2002); *Barrientes v. Johnson*, 221 F.3d 741, 770 (5th Cir.2000) (citing *McDonald v. Johnson*, 139 F.3d 1056, 1059-60 (5th Cir.1998)).

a.

According to the State, the district court hearing permitted the district court improperly to substitute its credibility determinations for those by the state court, contravening AEDPA's policy goals. Citing *Pondexter v. Dretke*, 346 F.3d 142, 147-49 (5th Cir.2003), and *Self v. Collins*, 973 F.2d 1198 (5th Cir.1992) (pre-AEDPA), the State observes correctly (as does the dissent) that, in reviewing a

state court decision, a federal habeas court is prohibited from substituting its credibility rulings for those by the state court simply because the district court disagrees with them.

Claiming erroneously that the same evidence was presented at the district court hearing in 2002 as at the earlier state court pre-trial hearings in 1996 and 1997 (the same witnesses providing the same testimony), the State presents a narrow claim concerning the district court's discretion to conduct the evidentiary hearing: where there will be no new evidence, and the federal habeas court intends only to make new credibility rulings regarding existing evidence, conducting an evidentiary hearing is an abuse of that discretion. The State objects to the district court's, in this fashion, evading its deferential obligations and the constraints placed on its discretion by AEDPA. *See Villafuerte v. Stewart,* 111 F.3d 616, 633 (9th Cir.1997) (not abuse of discretion to deny an evidentiary hearing where district court asked to hear "the same evidence heard by the state court in the state habeas proceeding. This is not a valid reason for an evidentiary hearing in district court").

The State offers no direct authority, however, for restricting the district court's discretion in this fashion. Instead, it contends that the restriction is consistent with AEDPA's purpose and principles. In this regard, the State seems to claim that AEDPA limits a federal habeas court's discretion to conduct an evidentiary hearing to those instances in which the facts were *not* fully developed in state court.

i.

[2] [3] Based on our review of the record, it is arguable that the State did not properly preserve this narrow issue in district court. Guidry does not claim this issue is raised for the first time on appeal. On the other hand, no authority need be cited for the rule that we, not the parties, select the appropriate standard of review,

including whether an issue will even be addressed if not raised in district court. *See McLuckie v. Abbott,* 337 F.3d 1193, 1200 n. 3 (10th Cir.2003) (refusing to address whether lack of evidentiary hearing was proper when no objection to its absence at district court habeas review).

Guidry's habeas petition requested an evidentiary hearing, and the district court ordered one in conjunction with denying the State's summary judgment motion. In neither instance did the State object to an evidentiary hearing; it certainly did *not* present the narrow hearing-is-prohibited issue it raises now. At most, an implied objection is perhaps presented in its joint answer to Guidry's habeas petition and summary judgment motion, concerning: pursuant to AEDPA, the deference due state court decisions and when an evidentiary hearing is expressly barred; and its summary judgment request.

Obviously, this issue should have been presented expressly and fully to the district court, especially when, on denying summary judgment, it ordered an evidentiary hearing. Had the issue been so presented, the record would be far better developed for our review; judicial efficiency and economy, far better served.

The State's discussion, in its joint answer to Guidry's habeas petition and summary judgment motion, concerning the AEDPA-mandated deference to state court decisions and when an evidentiary hearing is expressly barred by AEDPA, falls short of presenting adequately to the district court the narrow issue raised now concerning whether the district court abused its discretion by conducting the evidentiary hearing. Likewise, the summary judgment request is silent on that question. On the other hand, it might be contended that the narrow abuse of discretion issue was not fully developed until the evidence was presented at the hearing and the district court ruled. From this perspective, only then did

the State have all of the claimed components for the narrow issue it presents.

In any event, the issue's not being fully preserved may have been because, despite the petition's requesting an evidentiary hearing, the decision to conduct one appears to have been *sua sponte*, consistent with AEDPA and Rule 8 of Rules Governing Section 2254 Cases in the United States District Courts, discussed *infra*. In ordering the hearing, the district court did not mention Guidry's request for an evidentiary hearing. Nor did Guidry mention that request in his opposition to summary judgment.

Along this line, no authority need be cited for the well-established rule that, after conditional habeas relief was granted, the State was *not* required to move the district court to reconsider its having ordered the hearing in order for the State to preserve this narrow issue for review. Accordingly, based on our review of the record, and especially because the narrow issue arose for the most part, if not totally, through the district court's *sua sponte* exercise of its discretion to conduct the evidentiary hearing, we will consider it.

ii.

As we understand the State's narrow challenge to the evidentiary hearing's being held, it is premised in large part on the same evidence being presented in that hearing that was presented in the two pre-trial hearings in state court on the motion to suppress Guidry's confession. Had this narrow issue been presented to the district court upon its ordering the hearing to be held, the district court could have decided whether it had merit. (Likewise, the *Dissent* at 331 maintains "the district court ... [held] an evidentiary hearing to rehear the same testimony heard by the state court". This is not so.) In any event, although the same witnesses testified in district court as in state court, there was no way, of course, for

the district court to know whether testimony at the federal hearing would be identical to that at the state hearings, even if the same witnesses were to be called. This is demonstrated vividly by how Detective Roberts' testimony changed.

Because of the belated manner in which the issue has been raised (post grant of conditional habeas relief), a far different scenario exists. As discussed, although the evidence at the district court hearing was, in most respects, the same as at the state hearing, there were some significant differences. For example, Detective Roberts testified at the district court hearing that: prior to questioning Guidry on 7 March 1995, he contacted an assistant district attorney to ensure there would be no conflict in his doing so because Detective Roberts knew that, for persons in Guidry's circumstances (in jail for several days on another charge (bank robbery)), "usually ... an attorney is appointed [for] them"; nevertheless, for the 7 March interrogation of Guidry, he did *not* know Guidry had an attorney. As another example, Detective Roberts did recall the 15 March 1995 in-chambers conversation.

Accordingly, the factual prong for the State's narrow issue fails: the evidence was *not* the same. Arguably, therefore, there is no merit to this issue. On the other hand, the State may be contending that, as a matter of law, the hearing should not have been held because, when the district court ordered the hearing in conjunction with denying the State's summary judgment motion, the district court knew the same witnesses would testify at that hearing as had testified in state court; that, without more, the district court was required to accept the state trial court's implied credibility rulings.

In *Guidry II* at 12-14, the district court explained in great detail why, notwithstanding the AEDPA-mandated deference owed the state court decision, it could not, pursuant to AEDPA, determine whether that decision was unreasonable without first conducting an

evidentiary hearing to test the state court decision. In that regard, in the light of the summary judgment record, the district court made the following observations about the State's summary judgment motion and the state court suppression hearings:

[The State] argues that the testimony from the [15 March in-]chambers episode is not as beneficial as anticipated by Guidry's claim. [The State] focuses on three main factors: (1) the police denied making the [in-chambers] statements; (2) if the episode in chambers indeed occurred, the motive behind the [in-chambers] statement is unclear; and (3) the [in-chambers] statement does not prove that Guidry invoked his right to counsel. These factors, however, do not detract from the strength of Guidry's assertion. First, while Detective Roberts testified that no one made the [in-chambers] statement in question, *three members of the bar testified otherwise.* Detective Roberts' testimony in that respect is suspect. This is especially the case as Detective Roberts gave contradictory and inconsistent testimony on other grounds. Second, the fact that the motive behind the [in-chambers] statement is unclear highlights the inadequacies of the state review. *Respondent's attempt to characterize the [in-chambers] statement as a joke is pure speculation,* accentuating the need for factual development. It is especially difficult to ascertain Detective Roberts' motive from the record because he emphatically denied making any such statement in chambers. Tr. vol. 7 at 203. Finally, while the officer making the [in-chambers] comment did not expressly say that Guidry had invoked his right to counsel, the Court cannot turn a blind eye to the fact that the comment is based on the assumption that Guidry asked to speak to counsel. *The police would have no need to concoct a story about getting an attorney's permission to speak with a client if Guidry did not request counsel's assistance. The [in-chambers] comment by the police does more than enhance Guidry's credibility and detract from their own, it shows that the police potentially ignored Guidry's right to counsel.*

Id. at 13-14 (emphasis added). (The above demonstrates vividly why the district court felt a hearing necessary; obviously, it felt it could offer far more than, in the dissent's words, "little aid in determining whether the trial court's factual determination***322** was unreasonable in light of the evidence presented". *Dissent* at 333.)

Accordingly, in the light of this record, we turn to the district court's authority to conduct the evidentiary hearing. The State does not challenge a district court's discretion to conduct an evidentiary hearing, so long as it is not violative of the constraints imposed by AEDPA. Instead, the State claims the district court abused that discretion, especially concerning the state court's credibility determination.

iii.

In the light of the narrow issue presented by the State, it is not necessary to discuss pre-AEDPA jurisprudence in detail in order to understand AEDPA's constraints on a federal habeas court's discretion to conduct an evidentiary hearing. Well in advance of AEDPA's enactment in 1996, *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), had delineated the boundaries of a federal habeas court's authority and obligation to conduct evidentiary hearings. The Court determined the circumstances under which federal habeas courts had discretion to do so, as well as when they were *required* to do so. It held a federal habeas court *must* conduct an evidentiary hearing if

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313, 83 S.Ct. 745. The Court stated that a district court had discretion to conduct an evidentiary hearing in any case, even when none of the above circumstances was present. *Id.* at 318, 83 S.Ct. 745.

Former 28 U.S.C. § 2254(d) attempted to codify the dictates of *Townsend*. *See* 28 U.S.C. § 2254(d)(1994); *see also Miller-El v. Cockrell,* 537 U.S. 322, 358-59, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (Thomas, J., dissenting); *Valdez*, 274 F.3d at 948-50; *Joyner v. King*, 786 F.2d 1317, 1321-22 (5th Cir.), *cert. denied,* 479 U.S. 1010, 107 S.Ct. 653, 93 L.Ed.2d 708 (1986). In contrast to former § 2254(d), AEDPA greatly curtailed federal habeas court discretion to conduct evidentiary hearings. Express restrictions are found at 28 U.S.C. § 2254(e)(2).

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall *not* hold an evidentiary hearing on the claim *unless* the applicant shows that-
(A) the claim relies on-
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). Understandably, this standard is almost identical to the one a petitioner must satisfy to be permitted to file a second or successive habeas application under § 2254. *See* 28 U.S.C. § 2244(b)(2). Subpart (e)(2) is recognized as a "dramatic[ ] restric [tion]" on "the ability of district courts to hold an evidentiary hearing". *Spreitzer v. Schomig*, 219 F.3d 639, 648 n. 1 (7th Cir.2000), *cert. denied*, 532 U.S. 925, 121 S.Ct. 1366, 149 L.Ed.2d 294 (2001).

[4] Pursuant to its plain language, subpart (e)(2)'s hearing-bar applies, however, only if a habeas petitioner failed in state court "to develop the factual basis" for his claim. Moreover, "[u]nder the opening clause of [subpart](e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel". *Michael Williams*, 529 U.S. at 432, 120 S.Ct. 1479; *see also Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir.2000). Restated, if a petitioner develops a factual basis for a claim in state court (or sufficiently attempts to do so), subpart (e)(2) does *not* bar an evidentiary hearing in district court.

Guidry requested, and received, an evidentiary hearing in state court and provided ample evidence, to say the least, for the factual basis for his Fifth Amendment claim. Testimony at the pre-trial hearings-Guidry's and that of four lawyers-more than adequately developed that factual basis. Therefore, subpart (e)(2) did *not* bar the evidentiary hearing in district court. The State conceded this at oral argument here.

[5] As noted, the dissent maintains the district court abused its discretion in holding an evidentiary hearing because it did not intend to hear "new evidence", *Dissent* at 333, so there was "no justification" for its holding a new hearing, *id.* at 334. Where subpart (e)(2)'s bar does not apply, Rule 8 of the Rules Governing

Section 2254 Cases in the United States District Courts grants district courts the very discretion the dissent would proscribe. The version of Rule 8 in effect when the hearing was granted provided: If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings *and of the expanded record, if any, determine whether an evidentiary hearing is required.* If it appears that an evidentiary hearing is *not* required, the judge shall make such disposition of the petition as justice shall require.

Rule 8(a) (emphasis added). The amendment to Rule 8(a), effective 1 December 2004, makes no substantive change. The amended Rule provides:If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 [allowing district judge to "direct the parties to expand the record by submitting materials relating to the petition"] to determine whether an evidentiary hearing is warranted.

Post-AEDPA, Rule 8(a) has been interpreted to vest district courts with discretion to conduct an evidentiary hearing if not barred by subpart(e)(2). *See Murphy v. Johnson,* 205 F.3d 809, 815 (5th Cir.), *cert. denied* 531 U.S. 957, 121 S.Ct. 380, 148 L.Ed.2d 293 (2000); *Clark v. Johnson*, 202 F.3d 760, 765 (5th Cir.), *cert. denied,* 531 U.S. 831, 121 S.Ct. 84, 148 L.Ed.2d 46 (2000).

Our court has remanded to district court, with instructions to conduct an evidentiary hearing, *despite the state court's having held one*. *See Barrientes*, 221 F.3d at 770 (agreeing with State that district court abused its discretion by granting habeas relief *without* conducting evidentiary hearing where it "lacked sufficient *undisputed* facts to make an *informed* decision" (emphasis added)). And, in at least one instance, the State has *not* challenged the

federal habeas court's discretion to conduct an evidentiary hearing, despite the state habeas court's having held a hearing involving the same issue and nearly identical evidence. *See Valdez*, 274 F.3d at 948, n. 13 (in the light of *Michael Williams*, State abandoned its initial contention that the district court abused its discretion in conducting evidentiary hearing: "The Director asserts that ... the district court had the discretion to hold an evidentiary hearing....").

The restriction imposed by subpart (e)(2) evinced a "Congress[ional] intent to avoid unneeded evidentiary hearings in federal habeas corpus". *Michael Williams*, 529 U.S. at 436, 120 S.Ct. 1479. Noticeably absent from AEDPA's restrictions, however, is the one proposed by the State for this case. Instead, read in conjunction with Rule 8(a), subpart (e)(2) implies a federal habeas court has discretion to conduct an evidentiary hearing where none of the bars apply.

The State concedes that those bars did not apply to Guidry's claim. The district court decided an evidentiary hearing was required because: (1) testimony by Guidry and four lawyers-three of whom had served as assistant district attorneys-formed the basis for a constitutional claim that, if true, might entitle Guidry to relief; (2) gaps, inconsistencies, and conflicting testimony were not explained, or even mentioned, in the trial court's findings of fact and conclusions of law; and (3) these omissions reflected the trial court's failure to make crucial credibility determinations. These quite legitimate concerns about conflicting evidence permitted the district court, within AEDPA's boundaries, to investigate those conflicts so that it could rule properly on the habeas petition.

b.

[6] In deciding this issue, we do consider implied credibility determinations by the state court, as discussed *infra*. The implied

determination here, however, is that four lawyers testified falsely. This conclusion is too extraordinary to avoid development through an evidentiary hearing in district court.

Alternatively, the trial court's implicit finding may instead be: for the 15 March in-chambers conversation, the four lawyers told the truth but Detective Roberts lied; but, for the 7 March confession, Detective Roberts told the truth, but Guidry lied. In the light of this record, it is this type of speculation-made necessary when findings on crucial issues are "implied"-that demonstrates the need for explicit state court findings in this case. The district court did not abuse its discretion in conducting the evidentiary hearing.

2.

Under AEPDA, for a "claim that was adjudicated on the merits in State court proceedings", habeas relief will not be granted unless the state court's "adjudication of the claim-"
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was *based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2)(emphasis added). Such "determination of the facts" by the state court "shall be presumed to be correct"; the habeas petitioner "shall ***325** have the burden of rebutting the presumption of correctness by clear and convincing evidence". 28 U.S.C. § 2254(e)(1).

The State claims: the district court erroneously applied § 2254's subpart (e)(1) (presumption of correctness to be accorded a state court's "determination of a factual issue" unless "rebutt[ed] ... by

clear and convincing evidence") in not accepting the trial court's determinations of the facts; and this caused the district court not to accord the deference required by AEDPA under § 2254's subpart (d)(2) (whether the state court's decision "was based on an unreasonable determination of the facts"). (The State does not claim, in the alternative, that, even if the district court's subpart (e)(1) ruling is correct, its subpart (d)(2) ruling was incorrect. Therefore, that question is not before us.)

Pursuant to subpart (e)(1), the district court found the presumption of correctness rebutted by clear and convincing evidence (did not accept) for at least the following two trial court findings concerning the 7 March 1995 interrogation: that Guidry did *not* ask for his attorney; and that the detectives did *not* inform Guidry that his attorney gave Guidry permission to discuss the case with them. These non-accepted state court findings necessarily rest on several credibility determinations. In its findings and conclusions, the trial court found Guidry was *not* credible but the detectives were. But, again, the trial court was silent with respect to the testimony by the four lawyers who testified on Guidry's behalf. The State characterizes this silence, viewed in the context of the trial court's findings and conclusions as a whole, as "implied" credibility determinations against those lawyers. Citing *Galvan v. Cockrell*, 293 F.3d 760, 764 (5th Cir.2002) (holding federal court defers to trier of fact for credibility determinations), the State claims AEDPA proscribes the district court's non-acceptance of the trial court's express and implied credibility determinations and of other trial court findings of fact.

[7] The State maintains: contrary to subpart (e)(1), the district court erred in not according the state trial court's findings the requisite presumption of correctness to which they were entitled because the four lawyers' testimony cannot be the requisite clear and convincing evidence for rebutting that presumption. The State bases this on its

assertion that the evidence found clear and convincing by the district court is, according to the State, essentially the same evidence that was provided-unsuccessfully-in state court. Therefore, again according to the State, the district court effectively substituted its credibility determinations for those of the state trial court. As discussed, a federal habeas court is prohibited from doing this simply because it disagrees with the state court's determinations. *See Pondexter,* 346 F.3d at 148. (The *Dissent* at 333-34 errs in suggesting we do not employ this rule.) Before considering the findings by the state trial court, explanation is required for why we do *not* consider those by the *state habeas court.*

a.

[8] In July 2000, in adopting verbatim the State's proposed findings of fact and conclusions of law, the *state habeas court* made *alternative* findings of fact and conclusions of law concerning the confession's admissibility. Neither the State nor Guidry analyzes these alternative findings of fact and conclusions of law, nor does the district court mention them in its opinion. Instead, the focus is on the *trial court's* March 1997 written findings and conclusions. Possibly, this is because we can ignore the state habeas court's findings on the confession issue; as that court ruled, ***326** state law barred it from considering the issue because it had been addressed on direct appeal. "The general doctrine ... forbids an application for a writ of habeas corpus after direct appeal has addressed an issue." *Gill v. State,* 111 S.W.3d 211, 214 n. 1 (Tex.App.-Texarkana 2003) (holding this general rule does not apply to ineffective assistance of counsel claim).

In any event, the state habeas court's findings did *not* conflict with the state trial court's. Although the state habeas court's findings added a summary of Gottlieb's and Duer's testimony at the 1996 hearing, they included *no* evaluation of that testimony, *no*

credibility determinations, and *no mention of the testimony at the 1997 hearing*. Because the state habeas court's findings were in the alternative, and because that court reached the same legal conclusion as did the state trial court and did *not* make any conflicting findings or determinations, the state trial court's findings of fact control. *Cf. Walbey v. Dretke*, 100 Fed. Appx. 232, 235 (5th Cir.2004) (unpublished) (holding state habeas court's "factual findings did not survive [state habeas] appellate review, so that the district court did not err when it failed to defer to those findings in denying habeas relief", where the state habeas appellate court (1) failed to adopt the habeas court's findings and (2) those findings were *directly inconsistent* with the appellate court's). Therefore, the district court was correct to focus on the state trial court's determinations of fact.

b.

[9] When a district court considers whether to accept a state court's determinations of fact, including credibility determinations, it must act, of course, in accordance with "the respect due state courts in our federal system". *Miller-El*, 537 U.S. at 340, 123 S.Ct. 1029. For state court determinations of fact, this deference is embodied in subparts (d)(2) and (e)(1). The State's challenge is to the district court's application of subpart (e)(1) (state court determinations of fact presumed correct unless rebutted by clear and convincing evidence). Under subpart (d)(2), a state court decision may be overturned on factual grounds only if its determinations of fact are "objectively unreasonable in the light of the evidence presented in the state-court proceeding". *Miller-El*, 537 U.S. at 340, 123 S.Ct. 1029 (citing *Terry Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion of O'Connor, J.)).

Again, the dissent mistakenly views our position as being contrary to the well-established rule that the district court may not substitute its own credibility determinations for those of the state court simply

because it disagrees with the state court's findings. Notwithstanding AEDPA's requiring substantial deference for state court determinations of fact, such deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court *can disagree with a state court's credibility determination* and, when guided by AEDPA, conclude [under subpart (d)(2)] the decision was unreasonable or that [under subpart (e)(1)] the factual premise was incorrect by clear and convincing evidence.

Id. (emphasis added). Consistent with this scheme, and pursuant to subpart (e)(1), the district court did not accept the state court's determinations of fact because the trial court made *no* findings on considerable evidence critical to Guidry's claim. *Guidry III* at 12-15. Consequently, under subpart (d)(2), the district court concluded the trial court's decision "was based on an unreasonable determination of the facts". *Id.* at 15 (citing *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Guidry has challenged the state court's failure, through express determinations of fact, including credibility determinations, to resolve evidentiary conflicts that are crucial to his claim. According to the dissent, the district court must defer to trial court factual determinations, even when they are presented without explanation concerning extremely important and conflicting evidence. On the contrary, certainly on this record, such absence suggests an unreasonable determination; the district court was required to review the underlying facts, even though they were adduced at a full and fair hearing. Contrary to the dissent, we certainly do *not* suggest "that a habeas petitioner can satisfy his burden under subpart (e)(1), and thereby discredit the state court's factual finding, merely by pointing to a failure by the trial court to make explicit credibility findings regarding particular witnesses".

Dissent at 332.

Again, in its written findings, the trial court weighed Guidry's testimony against the testimony of Detectives Roberts and Hoffman and Sergeant Billingsley; but, it omitted the testimony of four lawyers-Duer, Gottlieb Scott, and Yarborough-that corroborated Guidry's. The lawyers' testimony is crucial for determining whether Guidry asked for his attorney and whether the detectives stated falsely that they had spoken with that attorney and he had stated Guidry could talk with them. The district court did not err in its application of subpart (e)(1).

The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, where the witnesses are apparently credible, brought into question whether, under subpart (d)(2), its "decision ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding". After reviewing the demeanor of Detectives Roberts and Hoffman at the 2002 hearing, and finding them not credible, while observing the credible testimony of the four lawyers and Guidry, the district court, pursuant to subpart (e)(1), was in an even better position not to accept the trial court's findings.

B.

[10] The district court's findings of fact are reviewed only for clear error; its conclusions of law and rulings on mixed issues of law and fact, *de novo*. *E.g.*, *Valdez*, 274 F.3d at 946. Again, the district court granted two of Guidry's claims: (1) his confession was obtained in violation of his Fifth Amendment right against self-incrimination; and (2) Gipp's hearsay testimony against Guidry's interest violated his Sixth Amendment confrontation right.

1.

[11] The district court found: Guidry invoked his right to counsel during his interrogation by Detectives Roberts and Hoffman; and the detectives induced Guidry's confession by telling him, falsely, that they had spoken to his robbery-charge-attorney, Duer, and that Duer had authorized Guidry's cooperation without Duer's being present. *Guidry III* at 14-15. The State contends these findings are clearly erroneous because they rely on identification testimony from the lawyer witnesses that is ambiguous at best.

There were discrepancies in the lawyers' testimony regarding the identity of the detectives participating in the 15 March 1995 in-chambers conversation. *At the 1996 pre-trial hearing,* Gottlieb stated that, before 15 March, she had never seen the detectives present during that in-chambers conversation and did not know their names. And, when Detectives Roberts***328** and Hoffman were brought into the courtroom during that hearing in 1996, she identified the "bigger of the two", Detective Hoffman, as the person making the in-chambers comments about Guidry's interrogation. (Detective Hoffman testified at the district court hearing in 2002 that he had never been in those chambers.) *Gottlieb testified differently at the 1997 pre-trial hearing,* stating that she did not remember which detective made the in-chambers comments, but that she thought it was the "short one" (Detective Roberts). Moreover, at that hearing, Scott and Yarborough identified Roberts as the detective involved in the conversation. Yet, the State points out, neither knew Detective Roberts' name at the time of the conversation and identified him only after he was singly brought into the courtroom. Further, the witnesses were unsure about the identity of the other detective present during the in-chambers conversation.

a.

Although the 1996 and 1997 pre-trial hearings provided the factual basis for Guidry's claim (preventing subpart (e)(2) from barring the 2002 district court evidentiary hearing), the district court's credibility determinations were made on the basis of the 2002 testimony, after the court had the opportunity to observe and evaluate witness demeanor and credibility. *Guidry III* at 13-14. The district court noted numerous contradictions in Detective Roberts' testimony during the 2002 hearing and conflicts between testimony from different hearings. For example, Detective Roberts testified at the 1997 pre-trial hearing that he had *not* been present at the 15 March in-chambers conversation; *at the 2002 hearing, however, he acknowledged being present,* but claimed he could *not* remember the conversation. Detective Roberts offered conflicting testimony at each hearing regarding when, and whether, he knew Guidry had an attorney for the robbery charge. And, as noted, at the district court hearing, he testified for the first time about contacting an assistant district attorney, *prior to questioning Guidry,* because he realized, based on Guidry's having been in jail for several days, that he probably had a lawyer.

After reviewing the record and the witnesses' testimony ("particularly their demeanor"), the district court ruled that the detectives were *not* credible, but the lawyer witnesses and Guidry were. It was well aware of the conflicts in the testimony noted by the dissent. The court found that Guidry had invoked his right to counsel, and that the detectives had told him, untruthfully, that they had contacted his attorney, who had approved Guidry's cooperation. Again, the court was aware of ambiguities in the lawyers' testimony identifying Detective Roberts as the detective present for the in-chambers conversation; but, these ambiguities were resolved when, at the district court hearing, Detective Roberts *admitted* to being present in those chambers. These findings are *not* clearly erroneous.

b.

[12] [13] *Edwards v. Arizona,* 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), provides the bright-line rule for applying the Fifth Amendment to the confession claim: when an accused expresses his desire to speak to police only through counsel, he is not subject to further interrogation until counsel is made available to him, unless the accused initiates further communications with the police. In reviewing whether a waiver of this Fifth Amendment right is knowing and voluntary, a court must assess whether: it was the product of intimidation, coercion, or deception; and it was made with full awareness of one's constitutional rights. ***329** *See Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

[14] The district court ruled that Guidry invoked his Fifth Amendment right by asking, twice, to speak to his attorney. And, as the district court noted, although Guidry later signed and initialed a waiver of his rights, and received a recitation of his *Miranda* rights in a subsequent videotaped walk-through of the crime scene, those events occurred *after* Guidry invoked his right to counsel, and, according to his credible testimony, only *because* Guidry believed counsel had advised him to speak freely with police. The police deception caused Guidry to waive his rights under a misapprehension of the full circumstances surrounding that waiver.

Guidry III at 16 (emphasis in original).

The district court concluded correctly that, under these circumstances, Guidry's confession was *not* voluntary and that the state trial court erred by not suppressing it. Therefore, pursuant to 28 U.S.C. § 2254(d)(2), the district court concluded properly that the state court's adjudication of the claim was based on an unreasonable determination of the facts. (The State contends that, even if the confession should have been excluded, its admission

was harmless error. We disagree, as discussed *infra*.)

2.

On direct appeal, the State conceded that Gipp's testimony included hearsay (statements by Prystash) but urged it was admissible. *Guidry I*, 9 S.W.3d at 147. Part of Gipp's hearsay testimony concerned the following statements by Prystash against Guidry's interest: Prystash was going to take Guidry to the Frattas' home on the night of the murder; Prystash and Guidry killed Farah Fratta; Guidry shot her in the head as she exited her vehicle; after the murder, Prystash picked Guidry up in Prystash's automobile; after the murder, Guidry was to receive $1000 for the murder; and, on the night of the murder, Prystash was to obtain that $1000 for Guidry from Robert Fratta.

[15] The district court granted habeas relief on Guidry's claim that Gipp's repeating these statements by Prystash violated Guidry's Sixth Amendment confrontation right. *Guidry III* at 20. "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. Admission of hearsay statements of the type at issue violates this clause unless the witness is unavailable and the defendant had prior opportunity to cross examine him. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1365-66, 158 L.Ed.2d 177 (2004).

a.

[16] On direct appeal, the Court of Criminal Appeals held that Prystash's statements against Guidry's interest, admitted through Gipp, were *not* admissible. *Guidry I*, 9 S.W.3d at 149. It held: those statements did not fall within a hearsay exception; and it was "doubtful [they] possessed 'particularized guarantees of trustworthiness' sufficient to overcome the presumption of hearsay

unreliability". *Id.* at 151.

The district court agreed with this holding by the Court of Criminal Appeals: Prystash had "every reason" to attempt to spread the blame for Farah Fratta's death and inculpate Guidry in the murder-for-hire. *Guidry III* at 22. The district court concluded: Importantly, the record gives no particular basis upon which to gauge Prystash's credibility when he made those statements. This Court will not upset the holding of the Court of Criminal Appeals that Gipp's hearsay-laden testimony inculpating Guidry in the murder violated the Confrontation Clause.

Id. Particularly in the light of the Supreme Court's recent decision in *Crawford,* the district court's conclusion regarding the inadmissibility of Prystash's challenged statements was correct.

b.

[17] Unlike the Court of Criminal Appeals, however, the district court held admission of this hearsay testimony by Gipp was *not* harmless error. Guidry's confession having been excluded by the district court, there was scant evidence to support his conviction, other than Prystash's statements admitted through Gipp. And, other than those statements, there was *no* evidence showing Guidry killed Farah Fratta for remuneration-the capital offense for which Guidry was convicted. *Id.* The district court concluded: because the hearsay testimony "served as an indispensable piece of evidence to convict Guidry of capital murder", it "had both a substantial and an injurious effect in determining the jury's verdict". *Id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

The State contends the admission of both the hearsay testimony and the confession was harmless error, claiming the remaining evidence

is sufficient to establish Guidry's role in the murder: two neighbors testified that they saw a black male (Guidry is black) dressed in black clothing in the Frattas' garage just after the shooting; one neighbor testified that this person left the scene in a vehicle matching the description of Prystash's automobile; when Guidry was arrested in early 1995, the murder weapon was in his possession; and, when the police searched Robert Fratta's vehicle, they discovered an address book with Gipp's telephone number and an unmarked envelope containing $1050.

Along this line, in her admissible testimony, Gipp testified: Guidry lived in an apartment next to hers, and they shared a staircase and landing; Prystash was her boyfriend; Guidry and Prystash talked often, with increasing frequency before the murder; and Prystash said he was planning the murder and explained the date selected would provide Robert Fratta with the alibi of being at church with his children. *Concerning the day of the murder*, Gipp's admissible testimony was: she returned to her apartment between 4:00 and 4:30 p.m. to find Guidry on the staircase landing, and he stated he was waiting for Prystash; Prystash arrived 30 minutes later, changed his clothes, and left; she observed both Guidry and Prystash wearing black; Prystash returned to her apartment at around 8:30 p.m., and Guidry entered his apartment around that time; Prystash went into the bedroom and unloaded a gun which he said he had obtained from Robert Fratta; leaving the gun in the apartment, Prystash left an hour later, saying he had to meet Robert Fratta to receive $1000; and Gipp recovered bullet casings from the trash and recorded the name and make of the gun.

As the district court observed, however, without the confession or Prystash's statements implicating Guidry, there is little evidence of Guidry's participation in the murder. Although the neighbors testified they observed a black male at the scene, they could *not* positively identify Guidry and told police they thought the assailant

could be white. And, although Guidry had the murder weapon in his possession when he was arrested in early 1995, this was four months after the murder, when the gun was used in the commission of a robbery.

[18] Moreover, there is *no* evidence tying Guidry to the charged capital offense of murder for remuneration. Under Texas law, proof of murder for remuneration or promise of remuneration requires a "focus ... on the actor's intent or state of mind: Did the actor kill in the expectation of receiving some benefit or compensation"? *Urbano v. State*, 837 S.W.2d 114, 116 (Tex.Crim.App.1992). Of course, this state of mind element must be proved beyond a reasonable doubt; "[i]f the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient". *Id.* Although $1050 was found in Robert Fratta's vehicle, there is *no* admissible evidence tying Guidry to it.

The district court's conclusions were correct. Without the confession and challenged hearsay, there is insufficient evidence to convict Guidry of murder for remuneration or promise of remuneration. Because of the substantial prejudice of permitting this contested evidence before the jury, its erroneous admission was *not* harmless error. Accordingly, the district court properly granted conditional habeas relief, pursuant to 28 U.S.C. § 2254(d).

III.

For the foregoing reasons, the judgment is

AFFIRMED.

EMILIO M. GARZA, Circuit Judge, dissenting:

The majority holds that (1) the district court did not err in its application of sections 2254(d)(2) and 2254(e)(1) of AEDPA when it disregarded the state trial court's finding that Howard Guidry did not ask to speak to an attorney before confessing to murdering Farah Fratta and (2) that the district court did not abuse its discretion in holding an evidentiary hearing to rehear the same testimony heard by the state court. Given the conflicting testimony and ample evidentiary record in the state proceeding, these holdings fail to afford to the state court's decision the deference mandated by AEDPA.

The majority states, with apparent approval, that "pursuant to [28 U.S.C. § 2254(e)(1)], the district court did not accept the state court's determinations of fact *because* the trial court made *no* findings on considerable evidence critical to Guidry's claims." (first emphasis added). It then notes that the state trial court "omitted the testimony of four lawyers-Duer, Gottlieb, Scott, and Yarborough ..." in its written findings, states that this testimony "is crucial for determining whether Guidry asked for his attorney" and, without further explication, concludes that "[t]he district court did not err in its application of subpart (e)(1)." Thus, under the majority's analysis, the trial court's failure to explicitly address the attorneys' testimony in its findings of fact apparently permitted the district court to disregard the presumption of correctness that would otherwise have attached to the state court's conclusion that Guidry did not ask to speak to his attorney.

Section 2254(e)(1) provides that "a determination of a factual issue by a state court shall be presumed to be correct" and that the petitioner "has the burden of rebutting the presumption of correctness by clear and convincing evidence." I find nothing in this language to support the proposition, seemingly endorsed by the

majority, that a habeas petitioner can satisfy his burden under subpart (e)(1), and thereby discredit the state court's factual finding, merely by pointing to a failure by the trial court to make explicit credibility findings regarding particular witnesses. [1]The question before this Court is not whether the state court adequately addressed all of the testimony it heard in its findings of fact, but whether Guidry overcame by clear and convincing evidence the statutorily-mandated presumption that the state court's finding-that Guidry did not ask to speak to his attorney before confessing to the murder of Fratta-was correct.

The majority notes that Roberts' testimony before the state court contained contradictory testimony about whether he knew Guidry had counsel[2] and that the testimony of the three attorneys about Roberts' subsequent in-chambers statement, if believed, supports Guidry's version of events and undermines Roberts' credibility. But the three attorneys' testimony suffered from its own weaknesses. In the first state evidentiary hearing, Gottlieb testified that she stated to two police officers that Guidry had an attorney and that the officers replied that they had "talked to the attorney and gotten permission to talk to Mr. Guidry before [they] took him out to save his statement, make a statement and to give [them] a tour of the scene of the crime." Gottlieb identified Hoffman (the "bigger

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[1] This court has previously held that the presumption of correctness that attaches to state court findings of fact under AEDPA applies even in cases where the habeas petitioner was denied a full and fair hearing in state court. *Valdez v. Cockrell*, 274 F.3d 941, 942 (5th Cir.2001). It seems to me inconsistent to now suggest that the AEDPA-mandated presumption of correctness is nevertheless inapplicable where the petitioner shows that, while he was granted a full and fair hearing and the state court explicitly made the factual finding now being contested, the state court failed to articulate credibility findings regarding witness testimony that the federal court found sufficiently troubling.

[2] Both detectives, however, consistently maintained that Guidry never asked to speak to his lawyer.

of the two") as the one who made the statement. At the second state evidentiary hearing, however, Gottlieb testified that Scott, not she, was the one who asked about the confession and identified Roberts ("the short one") rather than Hoffman as the officer who claimed that they had received permission from Guidry's attorney. Scott, in turn, testified that supervisor Danny Billingsly, not Hoffman, was the second officer present during the conversation. Scott also testified that Roberts might have been joking or "smarting off" when he made the statement.[3]

Whether Guidry asked to speak to his attorney necessarily turns on whose version of events the fact finder finds credible-Guidry or the detectives who questioned him. The credibility of the detectives' testimony, in turn, depends in part on the credibility of the three attorneys' recollection of the alleged in-chambers conversation. *If* Roberts told the three attorneys that he had obtained permission for Guidry's attorney before questioning Guidry and *if* he intended that statement to be believed, then those facts strongly support Guidry's version of the events preceding his confession. On the record before us, however, those factual conclusions are not compelled in light of the inconsistent testimony of witnesses on both sides. *See Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993) ("[W]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error."); *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) ("When ... the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for ... according [the trial court's]

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[3] The state court also noted that Guidry admitted to "habitually being cooperative" with police.

determinations presumptive weight."). Accordingly, Guidry has not shown by clear and convincing evidence that the trial court's determination that he did not ask to speak to his lawyer was incorrect and there is therefore no legal basis to hold that the trial court's decision was based upon an unreasonable determination of the facts in light of the evidence presented.

Again focusing on the trial court's failure to make explicit credibility determinations regarding the attorneys' testimony, the majority concludes that the implied credibility determinations of the trial court are "too extraordinary to avoid development through an evidentiary hearing in district court" and therefore holds that the district court did not abuse its discretion in ordering such a hearing. I disagree. The district court had before it an ample record with which to determine whether the trial court's decision was based on an unreasonable determination of the facts in light of the evidence presented. As the majority acknowledges, "Guidry requested, and received, an evidentiary hearing in state court and provided ample evidence, to say the least, for the factual basis of his Fifth Amendment claim. Testimony at the pre-trial hearings ... more than adequately developed that factual basis." In other words, the state court allowed Guidry every opportunity to develop his version of the events surrounding his confession and there is no suggestion that Guidry was prevented from introducing any evidence helpful to his claim. Given the extensive development of the evidence in state court and the apparent contradictions in the testimony of many of the witnesses, an additional evidentiary hearing could offer little aid in determining whether the trial court's factual determination was unreasonable in light of the evidence presented.

To the contrary, the record supports a holding that the evidentiary hearing was an abuse of discretion because it appears that the district court used the proceeding not to hear new evidence but instead to substitute impermissibly its own credibility

determinations for those of the state court. After the hearing, the district court explained "I need to be able to make some credibility determination on my own and figure out what's going on. Now that I have heard the evidence, I guess it's time for me to look at basically the same issues again but with a little more knowledge." The district court later rejected the State's argument that it had to defer to the state court's credibility determinations so long as they were supported by the record because "[e]ach of the cases cited by the [State concerned] a district court's inability to reconsider a state court's credibility determination on the basis of the record alone." Here, the court noted, its "credibility evaluation focuses not on the cold record, but on the same live witnesses, and presumptively the same demeanor, as was presumably considered by the trial court. This Court's evaluation of the witnesses' credibility, therefore, extends beyond a mere review of whether the record supports the state court determination."

A district court may, in an appropriate case, reject the factual findings and credibility determinations of a state court. *See Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). But the court may not substitute its own credibility determinations for those of the state court simply because it disagrees with the state court's findings. *See* *334Pondexter v. Dretke, 346 F.3d 142, 147-49 (5th Cir.2003) (finding that the district court "failed to afford the state court's factual findings proper deference" by "rejecting the state court's credibility determinations and substituting its own views of the credibility of witnesses"). In this case, the trial court's factual conclusion turned on credibility determinations. There were weaknesses in the testimony of witnesses on both sides, and the trial court's factual determination made clear that it credited the detectives testimony that Guidry had not asked to speak to an attorney. Because the evidentiary record was more than adequate, and because there was insufficient justification for rejecting the

factual finding and accompanying implied credibility determinations of the district court, there was no justification for the district court's *sua sponte* decision to conduct its own evidentiary hearing. Accordingly, I would hold that the district court abused its discretion. *See Villafuerte v. Stewart,* 111 F.3d 616, 633 (9th Cir.1997) (holding that the district court did not abuse its discretion in denying a request for an evidentiary hearing to hear the same evidence heard in the state habeas proceeding and stating that "[t]his is not a valid reason for an evidentiary hearing in district court"); *Guerra v. Johnson,* 90 F.3d 1075, 1078 (5th Cir.1996).

For the above stated reasons, I respectfully dissent.[4]

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[4] Because I conclude that admission of Guidry's confession did not violate his Fifth Amendment right, and because his confession along with other evidence establishes that Guidry murdered Fratta in exchange for a promise of $1,000, I would find that admission of Mary Gipp's testimony did not have a substantial and injurious effect in determining the jury's verdict. *See Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

APPENDIX B

United States Court of Appeals,Fifth Circuit.
Howard Paul GUIDRY, Petitioner-Appellee,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellant.
No. 03-20991.

Oct. 25, 2005.

Kenneth A. Williams, Southwestern University School of Law, Los Angeles, CA, Robert M. Rosenberg, Wilton Manors, FL, for Guidry.
Tina J. Dettmer, Austin, TX, for Dretke.

Appeal from the United States District Court for the Southern District of Texas; Vanessa D. Gilmore, Judge.

ON PETITION FOR REHEARING EN BANC
(Opinion Jan. 14, 2005, 5th Cir., *Guidry v. Dretke*, 397 F.3d 306)

Before BARKSDALE, GARZA and DENNIS, Circuit Judges.

PER CURIAM: Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in active service not having voted in favor (FED. R.APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

The author of the underlying majority opinion, RHESA HAWKINS BARKSDALE, Circuit Judge, offers the following comments regarding the Dissent to the Denial of Petition for Rehearing En Banc (Dissent to Denial).

Howard Guidry was convicted in Texas state court of murder for remuneration and given the death penalty (death-penalty conviction). The district court granted conditional habeas relief pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA); our divided panel affirmed. The majority opinion and dissent from that opinion go into great detail regarding the numerous factual and legal issues surrounding AEDPA's application, including whether the district court abused its discretion in holding an evidentiary hearing. *Guidry v. Dretke*, 397 F.3d 306 (5th Cir.2005); *id.* at 331 (Garza, J., dissenting). Usually, no response is required to a dissent from the denial of en banc review; the underlying panel opinion is answer enough. This is an exception because the Dissent to Denial is wide of the mark. The most glaring instance is its reliance on an AEDPA issue that was never raised by the State in contesting the conditional habeas relief: the interplay of the properly-held evidentiary hearing and 28 U.S.C. § 2254(d)(2) (federal habeas relief to be granted if the state court "decision ... was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*" (emphasis added)).

I.

For his death-penalty conviction, Guidry was granted conditional federal habeas relief on his Fifth and Sixth Amendment claims. *Guidry*, 397 F.3d at 309. The Dissent to Denial challenges only the majority's holdings on the Fifth Amendment (confession) claim. To understand why en banc review is not compelled for this extremely fact-specific appeal, a far more detailed recitation of the facts is required than is provided by the Dissent to Denial. Of course, the most complete recitation is found in the underlying opinion. *See id.* at 309-18. Although the following recitation is far more complete than that offered by the Dissent to Denial, it only scratches the surface.

On 1 March 1995, Guidry was arrested for bank robbery; in his possession was the gun used to murder Farah Fratta on 9 November 1994. *Id.* at 310. On 7 March 1995, while Guidry was being held on the bank-robbery charge, Detectives Roberts and Hoffman questioned him about Farah Fratta's murder, resulting in his confession. *Id.*

The testimony at the pre-trial hearing on Guidry's motion to suppress the confession provided "sharply contrasting versions of the interrogation leading to the confession". *Id.* Guidry claimed: his robbery-charge attorney had instructed him *not* to discuss anything with anyone; therefore, when interrogated about Farah Fratta's murder, Guidry requested his attorney; after his second request, Detectives Roberts and Hoffman left the room; on returning, they advised Guidry they had contacted his attorney, who had given Guidry permission to answer their questions; and, in reliance on such alleged permission, Guidry confessed. *Id.* at 311.

Guidry's suppression motion claimed his confession was violative of his Fifth Amendment rights. *Id.* at 310. At the 1996 (first) pre-trial hearing on the motion, Gottlieb, an attorney unaffiliated with the Guidry case, testified about a 15 March 1995 conversation in the chambers of a Texas state judge, who was not present. *Id.* at 312-13. Those present for the in-chambers conversation were Gottlieb, Guidry's two attorneys for his murder charge, an assistant district attorney, Detective Roberts, and another detective. *Id.* at 313. According to Gottlieb, while discussing the circumstances under which Guidry had confessed approximately a week earlier, Detective Roberts and the other detective stated that they had talked to Guidry's attorney and obtained his permission for them to talk to Guidry before they took his statement. *Id.* at 313. Gottlieb testified that she and other in-chambers attorneys were shocked that such permission would have been given to a person suspected of capital murder. *Id.*

Detective Roberts, on the other hand, gave inconsistent testimony at the 1996 (first) pre-trial hearing, ultimately testifying that he *did not know* whether Guidry had an attorney, and that he "*never did confirm* if he had an attorney". *Id.* at 311-12 (emphasis in original). As discussed *infra*, a second hearing was held after Guidry's attorneys at the first hearing were allowed to withdraw so they could testify about the in-chambers conversation. As he had done at the first hearing, Detective Roberts gave inconsistent testimony at the 1997 (second) pre-trial hearing. First, he testified that he had "*no knowledge that [Guidry] had an attorney*"; later, he testified that Guidry had told him he had an attorney but never asked to speak with him. *Id.* at 312 (emphasis in original). He also testified that he had *no* recollection of the 15 March in-chambers conversation. *Id.* at 314.

Duerr, Guidry's robbery-charge attorney, testified at the 1996 (first) hearing that he never gave permission for anyone to discuss such matters with Guidry. *Id.* at 313. At this point in the hearing, Guidry's two murder-charge attorneys, who had been present at the in-chambers conversation, moved to withdraw as Guidry's counsel so that they could testify about that conversation; the motion was granted. *Id.* (stating that both attorneys, in addition to Gottlieb, testified at the subsequent 1997 hearing).

The suppression motion was denied orally prior to trial. "Just before doing so, the state court stated that, for purposes of ruling on the admissibility of Guidry's confession, the 15 March in-chambers 'conversation was absolutely meaningless, *except as it relate[d] to credibility*.'" *Id.* at 314 (alteration and emphasis in original). On 27 March 1997, the trial court entered post-verdict written findings of fact and conclusions of law regarding its pre-trial denial of Guidry's suppression motion, but did *not* mention the attorneys' testimony at the two pre-trial evidentiary hearings regarding the in-chambers conversation. *Id.* at 314-15.

On direct appeal, the Texas Court of Criminal Appeals rejected, *inter alia,* Guidry's Fifth Amendment claim, holding "the trial court's findings were sufficiently detailed". *Id.* at 315 (quoting *Guidry v. State*, 9 S.W.3d 133, 142 (Tex.Crim.App.1999), *cert. denied,* 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000)) (internal quotations omitted).

In May 2000, Guidry filed a state habeas petition raising, *inter alia,* his Fifth Amendment claim. *Id.* at 316. Two months later, without an evidentiary hearing, the state habeas trial court adopted verbatim the State's proposed findings of fact and conclusions of law. *Id.* In November 2000, the Texas Court of Criminal Appeals denied habeas relief, ruling that the habeas trial court's findings and conclusions were supported by the record. *Id.* Guidry filed his federal habeas petition in November 2001, raising, *inter alia,* his Fifth Amendment claim *and requesting an evidentiary hearing. Id.* The district court "denied the State's summary judgment motion and ordered an evidentiary hearing for the voluntariness *vel non* of Guidry's confession". *Id.* at 316-17 (detailing the district court's concern about the substantial factual questions pertaining to Guidry's confession, including the state court's failure to evaluate the veracity of the attorneys' testimony as well as the detectives' inconsistent and contradictory testimony). *In district court, the State never objected to the evidentiary hearing's being held. Id.* at 317.

At the district court evidentiary hearing, Guidry and the attorneys gave "substantially the same testimony" as at the two state pre-trial hearings. *Id.* On the other hand, Detective Roberts' testimony contained several substantial differences from his state-court testimony. *Id.* For example, he testified *for the first time* that, prior to questioning Guidry, he had contacted an assistant district attorney to seek permission to do so because, based on the length of time Guidry had been in jail on the robbery charge, *Roberts thought Guidry probably had an attorney. Id.* at 317-18. As another

example, Roberts testified, *again for the first time*, that he recalled the in-chambers conversation; and that, in the conversation, he never told Guidry's then murder-charge attorneys that, during Guidry's interrogation, he had contacted Guidry's robbery-charge attorney. *Id.* at 317.

Based on the evidentiary hearing, the district court ruled that, "pursuant to 28 U.S.C. § 2254(e)(1), Guidry, with the requisite clear and convincing evidence, rebutted the presumption of correctness AEDPA accords to state court determinations of fact". *Id.* at 318. Accordingly, in September 2003, the district court granted conditional habeas relief on, *inter alia*, Guidry's Fifth Amendment claim. *Id.* On appeal, our divided panel held, *inter alia*, that the district court: had not abused its discretion by conducting an evidentiary hearing; and had properly granted conditional habeas relief. *Id.*

II.

As is often the case, and understandably so, sharply differing views are offered for AEDPA's proper application to a state death-penalty conviction. In this instance, the differences are even more pronounced because the Dissent to Denial paints a picture greatly at odds with what has transpired, including during the appeal for which en banc review has been denied. The Dissent to Denial's most serious defect is its reliance upon an issue, never raised by the State, concerning the interplay of the district court evidentiary hearing and the strictures of 28 U.S.C. § 2254(d)(2) (federal habeas relief proper when the state court "decision ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

A.

The Dissent to Denial at ---- n.3 acknowledges that it presents

"[o]nly a thumbnail sketch" of these complicated facts. Nevertheless, the following five clarifications must be made to that all too brief recitation.

1.

Concerning Guidry's confession, the Dissent to Denial's block quote at ----from the state trial court's factual findings is confusing because the Dissent to Denial does not explain that the events described in that quotation came *after* Guidry claims he was misled by Detectives Roberts and Hoffman. Thus, the Dissent to Denial fails to describe properly the role Detective Roberts played throughout Guidry's interrogation and subsequent confession. *See Guidry*, 397 F.3d at 311 (setting forth Detective Roberts' involvement, according to Guidry).

2.

The Dissent to Denial at ---- states that, after the interrogation at issue, the crucial in-chambers conversation took place "at a later date". That "later date" was a *mere eight days* after Guidry's interrogation and confession. *Guidry*, 397 F.3d at 310. This short interval between the two events is pertinent, because it reflects that the claimed in-chambers comments by Detective Roberts were made soon after Guidry's interrogation.

3.

According to the Dissent to Denial at ----, the in-chambers conversation "could have left the impression that Detective Roberts may have lied about his contacts with Guidry's [bank-robbery] attorney". If the attorneys testified truthfully, then Detective Roberts did indeed lie. *Guidry*, 397 F.3d at 313-14. (On the other hand, to conclude that the attorneys lied is to find that they concocted

Guidry's version of the interrogation *before* he testified at the first evidentiary hearing, when two of the attorneys who had participated in the in-chambers conversation were his murder-charge counsel for that subsequent hearing. *Id.*)

4.

The Dissent to Denial at ---- maintains the state habeas court "held that Guidry failed to demonstrate a violation of his Fifth Amendment rights". As the state habeas court ruled, because Guidry's confession claim had been raised on direct appeal, the state habeas court was precluded from considering the issue and, thus, made only *alternative* rulings concerning the confession's admissibility. *Guidry*, 397 F.3d at 316, 325-26; *Gill v. State*, 111 S.W.3d 211, 214 n. 1 (Tex.App.-Texarkana 2003) ("The general doctrine ... forbids an application for a writ of habeas corpus after direct appeal has addressed an issue".).

5.

In listing differences between Detective Roberts' testimony at the 1996 and 1997 pre-trial suppression hearings and at the 2002 district court evidentiary hearing, the Dissent to Denial at ---- fails to note two of the most, if not *the* most, important changes in that testimony. First, in state court, Detective Roberts testified that he *did not know* that Guidry had an attorney; in district court, however, Detective Roberts testified that, prior to questioning Guidry, he had contacted an assistant district attorney to seek permission to question Guidry because, based on Guidry's having been in jail for several days for the bank-robbery charge, *Detective Roberts knew Guidry probably had an attorney*. *Guidry*, 397 F.3d at 311-12, 317-18. Second, when testifying at the district court evidentiary hearing, Detective Roberts stated, *for the first time*, that he *did recall* the 15 March 1995 in-chambers conversation. *Id.* at 317.

B.

In addition to the above factual corrections, the Dissent to Denial's following five erroneous contentions about AEDPA's application must be addressed. Again, the most significant error is a claim never raised by the State: that § 2254(d)(2) limits the evidence that may be considered by the district court to that presented in state court, even if, as here, the district court did not abuse its discretion in holding an evidentiary hearing. That issue is *not* present in this appeal and, accordingly, was *not* considered.

1.

The Dissent to Denial at ---- charges the majority opinion with "send [ing] confusing signals" to district courts and state courts about AEDPA. Instead, a clear signal is transmitted: the deferential review mandated by AEDPA does not *automatically* equate with affirmance when the state court fails to make crucial findings to support its ruling. *See Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.").

2.

Contrary to the assertion by the Dissent to Denial at ----, the district court did *not* conduct an evidentiary hearing "solely to reassess the state court's credibility choices". Rather, as described in the majority opinion, the hearing was held for several reasons. *Guidry*, 397 F.3d at 321-22, 324 (explaining that the district court's decision to hold an evidentiary hearing was based on: testimony of Guidry and four attorneys forming the basis of a constitutional claim that, "if true, might entitle Guidry to relief"; unexplained and unmentioned "gaps, inconsistencies, and conflicting testimony" in

the trial court's factual findings and legal conclusions; and omissions of key credibility determinations).

Along those lines, the majority opinion does not, as the Dissent to Denial suggests, "*overturn*[ ] the [state court] findings relating to the voluntariness of Guidry's confession" because of the above-referenced gaps, omissions, and unexplained testimony. *Dsnt. to Denial* at ---- (emphasis added). Rather, the majority *affirms* the district court's finding that, pursuant to 28 U.S.C. § 2254(e)(1), the presumption of correctness accorded those state court findings was overcome by the requisite clear and convincing evidence.

3.

The Dissent to Denial at ---- maintains the district court *abused its discretion* by holding an evidentiary hearing. The decision to hold that hearing was made *after* the district court had considered the State's summary judgment motion and ruled, *within its discretion,* that a hearing was required. *Guidry,* 397 F.3d at 316-17, 322 (noting that, in general, the State did *not* contest a district court's having *discretion* under AEDPA to conduct an evidentiary hearing; instead, it claimed an abuse of that discretion).

With certain exceptions, 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing if the factual basis of a claim was not presented in state court. Section 2254(e)(2), however, was *not* at issue here; at issue was § 2254(e)(1) (presumption of correctness to be accorded state court factual findings may be overcome by clear and convincing evidence). Indeed, *as the State conceded,* § 2254(e)(2) did *not* bar an evidentiary hearing; the factual basis was more than adequately presented in state court. *Guidry,* 397 F.3d at 323.

The district court's holding the hearing *was consistent* with our

precedent. In other words, as held by the majority opinion, the district court did *not* abuse its discretion. *Id.* at 318-24. "Where a district court elects, in instances not barred by § 2254(e)(2), to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) [(unreasonable application of law)] or (d)(2) [(unreasonable determination of the facts)]." *Valdez v. Cockrell,* 274 F.3d 941, 952 (5th Cir.2001), *cert. denied,* 537 U.S. 883, 123 S.Ct. 106, 154 L.Ed.2d 141 (2002); *see Murphy v. Johnson,* 205 F.3d 809, 815 (5th Cir.), *cert. denied,* 531 U.S. 957, 121 S.Ct. 380, 148 L.Ed.2d 293 (2000) (holding that Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court vests district courts with *discretion* to conduct an evidentiary hearing, so long as it is *not* barred by § 2254(e)(2)); *Clark v. Johnson,* 202 F.3d 760, 765 (5th Cir.), *cert. denied,* 531 U.S. 831, 121 S.Ct. 84, 148 L.Ed.2d 46 (2000) (same).

Rather than citing to our court's precedent, the Dissent to Denial cites a decision from another circuit to support its abuse-of-discretion contention. *Dsnt. to Denial* at ---- (citing *Villafuerte v. Stewart,* 111 F.3d 616, 633 (9th Cir.1997), *cert. denied,* 522 U.S. 1079, 118 S.Ct. 860, 139 L.Ed.2d 759 (1998)). The Dissent to Denial fails to note, however, a more recent decision from that circuit: *Taylor v. Maddox,* 366 F.3d 992 (9th Cir.), *cert. denied,* --- U.S. ----, 125 S.Ct. 809, 160 L.Ed.2d 605 (2004). *Taylor* held a state court's failing to make findings on critical evidence negated the § 2254(e)(1) presumption of correctness and caused the fact finding to be unreasonable; because petitioner relied *only* on the state court record, the circuit court engaged in its own fact finding. *Id.* at 1007-09.

4.

Undeterred by the State's *concession* that the evidentiary hearing

was *not* barred by § 2254(e)(2), the Dissent to Denial at ---- opines that the majority opinion "appears to broach the 'new evidence' prong of AEDPA Section 2254(e)(2)". This charge rests on Detective Roberts' changed testimony between the state and federal hearings. *Id.*; *Guidry*, 397 F.3d at 311-12, 317-18.

Again, except in limited circumstances, consideration of new factual claims is barred where "the applicant has failed to develop the factual basis of a claim in State court proceedings". 28 U.S.C. § 2254(e)(2). Detective Roberts was one of the State's key witnesses on the Fifth Amendment claim. His changing his state-court testimony at the federal evidentiary hearing does *not* fall within § 2254(e)(2)'s proscription. *On this record*, it is a stretch indeed to suggest § 2254(e)(2) might bar considering Detective Roberts' testimony at the district court evidentiary hearing because he changed his testimony from that given in state court when questioned on the same points.

5.

Finally, the Dissent to Denial's most serious error is maintaining the majority opinion violated § 2254(d)(2). Section 2254(e)(1), *not § 2254(d)(2)*, was at issue in this appeal. Section § 2254(d)(2) provides that habeas relief shall not be granted for any claim adjudicated on the merits in state court unless the adjudication "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*". 28 U.S.C. § 2254(d)(2) (emphasis added). Its counterpart, § 2254(d)(1), provides that habeas relief shall not be granted for any claim adjudicated on the merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law". 28 U.S.C. § 2254(d)(1).

In claiming only the state court record could be considered, notwithstanding the district court evidentiary hearing, the Dissent to Denial at ---- relies on the "evidence presented in the State court proceeding" language of § 2254(d)(2). In support, it cites *Holland v. Jackson*, 542 U.S. 649, 124 S.Ct. 2736, 2737-38, 159 L.Ed.2d 683 (2004), which held that, after the district court granted the State's summary judgment motion, the circuit court erred *under § 2254(d)(1)* in deciding that the state court's application of Supreme Court ineffective-assistance-of-counsel precedent was unreasonable because the circuit court relied on "evidence not properly before the state court". In *Holland*, however, there was *no evidentiary hearing* in district court and § 2254(d)(1), *not § 2254(d)(2)*, was at issue. *Id.* ("Under the habeas statute, [a] statement [relied upon by petitioner and first presented in state court *after* habeas relief was denied] could have been the subject of an evidentiary hearing by the District Court ... if the conditions prescribed by § 2254(e)(2) were met.").

More to the question at hand, the State did *not* raise this issue on appeal. *Guidry*, 397 F.3d at 325. Therefore, unless the issue is jurisdictional, it cannot be the basis for granting en banc review. This rule is so well established that citation to authority should not be necessary. *See, e.g., United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 677 (5th Cir.2003) (en banc) (Jones, J., concurring) (regarding an issue presented for the first time to the en banc court in a court-ordered supplemental brief: "[W]e review only those issues presented to us; we do not craft new issues or search for them in the record .... In short, it is not for us to decide which issues should be presented, or to otherwise try the case for the parties". (quoting *United States v. Brace*, 145 F.3d 247, 255-56 (5th Cir.) (en banc), *cert. denied*, 525 U.S. 973, 119 S.Ct. 426, 142 L.Ed.2d 347 (1998))).

Because the State relied only on § 2254(e)(1), the scope and limitations of § 2254(d)(2) were *not* at issue on appeal. Indeed, the

State's *not* raising a § 2254(d)(2) claim was noted in the majority opinion: "The State does not claim, in the alternative, that, even if the district court's [§ 2254](e)(1) ruling is correct, its [§ 2254](d)(2) ruling was incorrect. *Therefore, that question is not before us*". *Guidry*, 397 F.3d at 325 (emphasis added). In its Petition for Rehearing En Banc, the State does *not* challenge this conclusion.

As noted, the only exception that would allow our court *sua sponte* to consider the newly claimed strictures of § 2254(d)(2) would be if they were jurisdictional. In *Miller-El v. Dretke*, --- U.S. ----, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), evidence added to the record *after* the federal habeas petition was filed (the State did *not* object; no evidentiary hearing was held) played a key role in habeas relief being granted by the Supreme Court. *Id.* at 2335 n. 15. In challenging consideration of this supplemental evidence as being outside the state court record, and, therefore, claiming this violated the strictures of § 2254(d)(2), Justice Thomas maintained that those "strictures ... are not discretionary or waivable. Through AEDPA, Congress sought to ensure that federal courts would defer to the judgments of state courts, not the wishes of litigants". *Id.* at 2349 (Thomas, J., dissenting). In taking this position, Justice Thomas suggested that those strictures may be jurisdictional. *Id.* This position was *not*, however, adopted by the Court. *Id.* at 2335 n. 15.

In any event, the Dissent to Denial does *not* make a jurisdictional claim concerning § 2254(d)(2). In short, its assertions about that section and its interplay with evidence developed in a district court evidentiary hearing must await another appeal. The majority opinion takes *no* position on this issue.

III.

A majority of our court has decided that this extremely fact-intensive matter will not receive en banc review. The Dissent

to Denial offers various reasons for granting such review, but they are simply inconsistent with the record for this proceeding, including the majority opinion's precedent-supported holdings. AEDPA's application to state death-penalty convictions is complicated and subject to differing views. In this instance, however, the differences stated by the Dissent to Denial fall far short of demonstrating why our court should conduct en banc review, especially for the § 2254(d)(2) issue *never raised* by the State.

EDITH H. JONES, Circuit Judge, joined by E. GRADY JOLLY, JERRY E. SMITH, EMILIO M. GARZA, DeMOSS, EDITH BROWN CLEMENT and OWEN, Circuit Judges, dissenting from the denial of rehearing en banc:

With due respect to the panel majority's diligence, we dissent from the court's denial of rehearing en banc in this case. The majority opinion sends confusing signals to the district courts and, equally unfortunately, to our brethren in the state courts as to the acceptable standards and procedures for federal habeas review. The majority opinion also stands in tension with Congress's goal, enacted through AEDPA, of enforcing comity and deference toward state court judgments of conviction.

The legal mischief in the panel's decision lies in (a) its approval of the district court's holding an evidentiary hearing solely to reassess the state court's credibility choices,[1] and (b) its refusal to credit the

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[1] The panel concisely summarizes the reasons for the district court's decision to conduct an evidentiary hearing:

(1) testimony by Guidry and four lawyers-three of whom had served as assistant district attorneys-formed the basis for a constitutional claim that, if true, might entitle Guidry to relief;

(2) gaps, inconsistencies, and conflicting testimony were not explained, or even

state courts' decisions based on the outcome of that federal hearing.[2]

BACKGROUND

The state courts were required to decide whether capital murder defendant Guidry requested advice of counsel during his interrogation, and whether the detectives told him, untruthfully, that his attorney said he should talk to them.[3] (Guidry confessed to murder for hire at the end of the questioning.) The state trial court held two pretrial hearings to ferret out the truth. Guidry and the detectives differed on what was said during the interrogation. Four attorneys testified concerning unofficial conversations with two of the detectives at a later date (the "in-chambers testimony"), which conversations could have left the impression that Detective Roberts may have lied about his contacts with Guidry's attorney.

The state trial court denied Guidry's motion to suppress the confession, stating in open court that the "[in-chambers] conversation was meaningless, except as it relate[d] to credibility."

---

mentioned, in the trial court's findings of fact and conclusions of law; and (3) these omissions reflected the trial court's failure to make crucial credibility assessments.

Guidry v. Dretke, 397 F.3d 306, 324 (5th Cir.2005). The panel then approvingly states that "[t]hese quite legitimate concerns about conflicting evidence permitted the district court, within AEDPA's boundaries, to investigate those conflicts so that it could rule properly on the habeas petition." *Id.*

[2] The panel states with approval that, pursuant to 28 U.S.C. § 2254(e)(1), "the district court did not accept the state court's determinations of fact because the trial court made no findings on considerable evidence critical to Guidry's claim." *Guidry*, 397 F.3d at 326.

[3] A painstaking recitation of the facts appears in the majority opinion. Only a thumbnail sketch appears here.

Guidry v. Dretke, 397 F.3d 306, 314 (5th Cir.2005). The state court admitted Guidry's confession, in addition to substantial circumstantial evidence. After Guidry's conviction, the trial court wrote that:

At all times Guidry advised [Detective] Tonry in Hoffman's presence that Guidry understood what his rights [were], never requested to have an attorney, never asked to call his attorney, never desired his attorney, never refused to discuss the case without his attorney. And, as a result, Guidry continued voluntarily discussing his complicity in the ... murder for hire with Detectives Hoffman and Tonry .... [T]he statements were voluntarily made, not induced by force, threats or coercion, nor were any promises made, nor was anything done to induce [Guidry] or cause [Guidry] to make anything but a knowing and intentional waiver of his rights and a free and voluntary decision to confess.

(quoting the state trial court's findings of fact and conclusions of law). *Id.* at 314-15. The court made no written findings regarding the lawyers' testimony about the in-chambers conversation. Finding the trial court's express and implicit findings supported by the record and consistent with its determination that Guidry had not requested an attorney, the Texas Court of Criminal Appeals ("TCCA") affirmed the state court's suppression ruling.

The state habeas court, without an evidentiary hearing, held that Guidry failed to demonstrate a violation of his Fifth Amendment rights. The habeas court cited the 1996 hearing (specifically referencing the testimony of attorneys Gottlieb and Duer) but not the 1997 hearing at which attorneys Scott and Yarborough testified. The TCCA made no express findings reconciling the conflicting testimony or balancing the credibility of the witnesses. The TCCA affirmed the denial of habeas relief.

In response to Guidry's federal habeas petition, the district court

conducted an evidentiary hearing after concluding that "[t]he state courts made no attempt to evaluate the veracity of the attorney testimony or analyze its implication in this case. The state courts made no specific finding with respect to the inconsistent and contradictory testimony by the police officers." *Guidry*, 397 F.3d at 317. At the 2002 evidentiary hearing, all of the witnesses gave substantially the same, if not identical, testimony to that given at the state court hearings. However, a portion of Detective Roberts's 2002 testimony was different from his 1996 and 1997 testimony. In 2002, he testified, *inter alia*, that Guidry may have had an attorney, given the number of days he had been in jail, and that Guidry may have told him he had an attorney. *Guidry*, 397 F.3d at 317-18. Roberts continued to deny the ultimate contentions: that Guidry requested a consultation with counsel during his interrogation, *Guidry*, 397 F.3d at 332, n. 2 (Garza, J., dissenting); and that Roberts lied to Guidry that his attorney advised Guidry to answer the questions.

The district court then reevaluated the witnesses' credibility *de novo*, found that the detectives violated Guidry's Fifth Amendment rights, and granted him habeas relief on that claim. The panel affirmed the district court.

1. Granting a duplicative hearing.

Contrary to the panel majority, we would hold that the district court abused its discretion in ordering a *de novo* evidentiary hearing solely to reassess the credibility of the witnesses to the suppression issues who had already testified in at least one of the two state court evidentiary hearings. The panel majority's approval of this redundant hearing cannot be reconciled with AEDPA's requirement that the reasonableness of state court factfindings must be assessed "in light of the evidence presented in the state court proceedings."

28 U.S.C. 2254(d)(2).[4] *See also Holland v. Jackson,* 542 U.S. 649, 124 S.Ct. 2736, 2737-38, 159 L.Ed.2d 683 (2004) ("whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it*") (citing cases) (emphasis added). The majority relies heavily on the federal court's discretion to conduct hearings, conferred by Federal Rule 8 of the Rules Governing Habeas Proceedings, but that rule must be subservient to AEDPA and Supreme Court caselaw.

If the majority is right, then a federal court could, in its discretion, order an entire case retried in order to decide whether the evidence was constitutionally sufficient to support the defendant's guilt, or it could retry the evidence on a *Brady* claim to judge the police officers' credibility for itself. Any number of other examples could be advanced, but in all such cases, the federal court would be displaying the opposite of the deference to state court procedures and decisions from that mandated by AEDPA. Even before AEDPA was passed, where a state habeas petitioner "wanted the district court to hear the same evidence heard by the state court," it was held that, "[t]his is not a valid reason for an evidentiary hearing in federal court." *Villafuerte v. Stewart,* 111 F.3d 616, 633 (9th Cir.1997) (pre-AEDPA case, citing *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 11-12, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992)).

*12 Deference does not, of course, require the federal court always to approve state court credibility choices. *Miller-El,* 537 U.S. at 329, 123 S.Ct. at 1041. But a federal court has no warrant in AEDPA to retry historical facts simply to reassess witness

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[4] *See Miller-El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (Section 2254(d)(2) means that a decision "adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable *in light of the evidence presented in the state-court proceeding*") (emphasis added).

credibility.[5] The tension with AEDPA is heightened in this case by the majority's reliance on the circumstance that Detective Roberts actually changed his testimony in the federal district court hearing. The panel thus appears to broach the "new evidence" prong of AEDPA Section 2254(e)(2),[6] even though Guidry failed to satisfy the demanding predicate for admission of new evidence in the federal proceeding.

2. Rejecting the State Court Factfindings.

Pursuant to AEDPA, the factfindings of state courts are entitled to a presumption of correctness unless they are proven incorrect by clear and convincing evidence. 28 U.S.C. § 2254(e)(l). Here, the majority overturns the findings relating to the voluntariness of Guidry's confession because it finds gaps in the witnesses' testimony and it believes that the state courts failed to recite, explicitly reconcile, and measure the relative credibility of all conflicting testimony. The majority holds that the district court need not accept the state court's findings "because the trial court made no findings on considerable evidence critical to Guidry's claim." 397

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[5] Here the federal district judge explicitly stated, "I need to be able *to make some credibility determinations on my own* and figure out what's going on. Now that I heard the evidence, *I guess it's time for me to look at basically the same issues again* but with a little more knowledge." *Guidry*, 397 F.3d at 333 (Garza, J., dissenting) (quoting the federal district court record) (emphasis added).

[6] 28 U.S.C. § 2254(e)(2) sets stringent limits on the factual development of a new claim in federal habeas.

F.3d at 326. To the majority, these sins of omission-especially concerning the lawyers' testimony-apparently constitute clear and convincing evidence. The majority also holds that the state trial court's unexplained omission of findings "on evidence crucial to Guidry's claim, where the witnesses are apparently credible" brought into question whether the state courts reached a reasonable decision "in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

This is a close case on which reasonable federal judges can differ in result. But the majority's reasoning misses the mark. Our evaluation under AEDPA is not of the quality of the state courts' reasoning process, but of the reasonableness of the relevant factual determinations. If the state court's findings that Guidry did not express a desire to speak to his attorney and that he was not misled by the detectives are unreasonable in light of the attorneys' testimony, then so be it, but the state courts' failure to address the attorney testimony does not alone make the findings unreasonable. The panel majority state over and over that their decision is fact-bound, and we hope it is regarded as such. The decisive importance attached by the majority to the state courts' sins of omission can hardly be reconciled with the precedent of this court and the Supreme Court. Adhering to principles of finality, comity and federalism, we have held that the presumption of correctness applies to explicit factual findings, *Valdez v. Cockrell*, 274 F.3d 941, 947 & n. 11 (5th Cir.2001), and "to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Pondexter*, 346 F.3d at 148. Under AEDPA, federal courts review only the state courts' ultimate decision, "not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193-94 (5th Cir.2001). The "parsing of the state habeas court's findings does not conform to the spirit or letter of AEDPA's [§ 2254(e)(1)] deferential standards." *Pondexter*, 346 F.3d at 142. Finally, the en banc court has held that "[i]t seems clear to us that

a federal habeas court is authorized by Section 2254(d) to review only a state court's decision, and not the written opinion explaining that decision." *Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir.2002) (en banc).

Granting deference to state courts' implicit and explicit historical factfindings predates AEDPA, moreover, and is in fact a bedrock principle of federal habeas jurisprudence. *See, e.g., Marshall v. Lonberger,* 459 U.S. 422, 433, 103 S.Ct. 843, 850, 74 L.Ed.2d 646 (1983) (Sixth Circuit's reassessment of respondent's state trial court testimony was improper, whether undertaken because of state court's failure expressly to find credibility or out of federal court's desire to make a *de novo* review of the weight of the evidence); *LaVallee v. Delle Rose,* 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) (because it was clear that the trial court would have granted relief had it believed the defendant's testimony, its failure to do so was tantamount to an express finding against credibility).

Viewed in light of this guiding precedent, the panel majority's result may be justifiable, but the majority countenances an untenable district court procedure that unjustifiably undermines the letter and spirit of AEDPA. It is unsurprising, then, that the majority's analytical reasoning is anomalous. We respectfully dissent.

• 03-20991 (Docket) (Oct. 09, 2003)

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOWARD PAUL GUIDRY, Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. H-01-4140
	§	JUDGE VANESSA
	§	GILMORE
DOUG DRETKE, Director, Texas Department of Criminal Justice,Correctional Institutions Division, Respondent.	§	

ORDER

Pending before the court is Howard Paul Guidry's (Guidry") Petition for Writ of Habeas Corpus. (Instrument No. 6). Both parties have filed summary judgment motions in this case. (Instrument Nos. 30 and 32). On December 13, 2002, this Court held an evidentiary hearing in which the parties presented testimony relating to Guidry's claim that the trial court failed to suppress his involuntary confession. Having considered the testimony from that hearing, in conjunction with the record and the governing law, the Court will provisionally grant Guidry's petition for writ of habeas corpus.

I. Background

On August 15, 1996, a grand jury indicted Guidry for the capital murder of Farah Fratta. Tr. Vol. I at 3. The indictment

alleged that on November 9, 1994, Howard Paul Guidry murdered Farah Fratta "for remuneration and the promise of remuneration." Tr. Vol. I at 3. The indictment alleged that either the victim's husband (Robert Alan Fratta) or Joseph Andrew Prystash promised to reward Guidry for the murder with a vehicle or with money. Tr. Vol. I at 3.

The trial evidence showed that Farah Fratta's husband hired Joseph Prytash to kill her. Guidry's own confession and hearsay testimony from Prytash's girlfriend established that Guidry agreed to help Prytash kill Fratta for one-thousand dollars. Guidry confessed to being the one who shot the victim. At the conclusion of the guilt-innocence phase of trial, a jury found Guidry guilty of capital murder on March 21, 1997. Tr. Vol. I-A at 393. After a separate punishment phase, the jury answered Texas' special issues in a manner requiring the imposition of a death sentence. Tr. Vol. I-A at 408-09.

Guidry challenged his conviction and sentence on direct review in the Court of Criminal Appeals. In a published opinion, the Court of Criminal Appeals denied Guidry's appeal on December 15, 1999. *Guidry v. State*, 9 S.W.3d 133 (Tex. Crim. App. 1999). The United States Supreme Court denied *certiorari* review. *Guidry v. Texas*, 531 U.S. 837 (2000).

On May 1, 2000, Guidry filed a state application for habeas corpus relief. The trial court entered findings of fact and conclusions of law recommending that habeas relief be denied. State Habeas record at 121-46. On November 8, 2000, the Court of Criminal Appeals adopted the lower court's recommendation and denied relief. *Ex parte Guidry*, No. 47,417-01 (Tex. Crim. App. Nov. 8, 2000) (unpublished).

Guidry sought the appointment of counsel to prepare and

litigate a federal petition for writ of habeas corpus. Guidry filed his petition on November 1, 2001, through appointed counsel. (Instrument No. 6). In his federal petition, Guidry raises the following four grounds for relief.

- The State's use of Guidry's confession violated his right to be free from self-incrimination;

- The admission of incriminatory out-of-court statements violated Guidry's Confrontation Clause rights;

- The State violated Guidry's due process rights by referring to Robert Fratt's death sentence during closing arguments in the punishment phase; and

- The trial court's failure to excuse a juror violated Guidry's right to an impartial jury.

On September 10, 2002, this Court denied Respondent's initial summary judgment motion, finding that factual questions needed to be resolved in this case. (Instrument No. 12). Accordingly, this Court held an evidentiary hearing on December 13, 2002, in which the parties presented testimony relating to Guidry's claim that he involuntarily confessed to killing the victim. Respondent subsequently filed a renewed summary judgment motion (instrument no. 30), to which Guidry has responded and likewise moved for summary judgment (instrument no. 32).

II. Legal Standards

This Court's summary judgment review is circumscribed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Proctor v. Cockrell*, 283 F.3d 726, 729-30 (5th Cir. 2002). Under the AEDPA, federal relief cannot be granted unless (a) the

factual decisions of the state court are unreasonable in light of the evidence or (b) the determinations of legal issues or mixed questions of law and fact are contrary to, or an unreasonable application of, clearly established federal law. *See* U.S.C. § 2254(d)(1) and (2); *Williams v. Taylor,* 529 U.S. 362 404-05 (2000).

The Supreme Court holds that a state court decision is "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 365 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the sate court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams,* 529 U.S. at 407.

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated

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where it should apply." *Williams*, 529 U.S. at 407.

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.] *Miller-El v. Cockrell*, 537 U.S. 322, ___, 123 S. Ct. 1029, 1041 (2003). A federal habeas court must presume the underlying factual deteminations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, 537 U.S. at ____, 123 S. Ct. at 1036.

III. Legal Analysis

As previously noted, Guidry raises four claims. For the reasons that follow below, the Court finds that federal habeas relief is appropriate with respect to Guidry's claims involving his confession and the hearsay testimony presented at trial. The Court will deny Guidry's remaining claims.

A. Violation of Guidry's Privilege Against Self-Incrimination

In his petition, Guidry claims that the police took his incriminatory statements in violation of the Fifth Amendment's privilege against self-incrimination. Specifically, Guidry contends that the trial court's failure to suppress his statements violated the principles enshrined in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981), the Supreme Court held that, once a suspect in custody invokes the Fifth Amendment right to counsel, the police may not interrogate the suspect in the absence of counsel–even if the suspect later attempts to waive that right."

United States v. Avants, 278 F.3d 510, 514-15 (5th Cir.), *cert. denied*, 536 U.S. 968 (2002); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (stating that *Edwards* set forth a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers...."). "Under *Edwards*, any statement made by the suspect in response to police-initiated questioning after an invocation of the right to counsel violates the Fifth amendment and must be excluded." *Avants*, 278 F.3d at 515. The "'rigid' prophylactic rule [of *Edwards*] embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowing and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (citations omitted). Both inquiries involve mixed questions of law and fact. *See Soffar v. Cockrell*, 310 F.3d 588, 592 (5th Cir. 2002); *Gachot v. Stalder*, 298 F.3d 414, 418 (5th Cir. 2002).

1. *Factual Background*

In denying Respondent's first summary judgment motion, the Court summarized the factual background of Guidry's claim involving his confession. (Instrument No. 12 at 2-9). The Court incorporates that summary and briefly provides another factual recitation. Guidry challenges statements he made while subject to police interrogation. Guidry first gave the police a statement admitting some complicity in the murder, but which limited his involvement to that of a get-away driver. After subjecting him to a polygraph examination, the police secured a statement wherein Guidry admitted to shooting Farah Fratta for the promise of one-thousand dollars. Finally, the police videotaped Guidry as he walked through the crime scene and described how the murder occurred.

Before trial, Guidry sought to suppress his incriminating statements. On August 28, 1996, the trial court originally held a hearing concerning Guidry's motion to suppress. Tr. Vol. 3 at 8-103. When it became apparent that Guidry's counsel (Sylvia Yarborough and Robert Scott) would need to testify in his behalf, the trial court granted a continuance. Tr. Vol. 5 at 19. After the appointment of new counsel, the trial court held a hearing on February 20, 1997, in which the parties presented evidence relating to Guidry's confession.

The State presented testimony from Ronnie Roberts, Jim Hoffman, and Danny Billingsly, the three Harris County Sheriff Department officers involved in taking Guidry's confession. Each police officer testified that they did not know that an attorney represented Guidry in his aggravated robbery case. Tr. Vol. 7 at 12-13, 77, 99. Roberts later admitted that Guidry told him that he had an attorney, but stated that Guidry never indicated that he wanted to speak with counsel. Tr. Vol. at 31-32.

Guidry testified that the police officers did not read him his rights during the initial stages of the interrogation. Tr. Vol. 7 at 158. Guidry testified that, after Roberts showed him pictures of the victim's corpse, he asked to speak to his attorney who had been appointed for an unrelated charge (Layton Duer). Tr. Vol. 7 at 167. The two officers then left the room for over an hour. Tr. Vol. 7 at 168. Later, Hoffman returned and told Guidry that the police had obtained a statement from his accomplice, Joseph Prystash. Tr. Vol. 7 at 31-32.

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Hoffman told him "no." Tr. Vol. 7 at 167. The two officers then left the room for over an hour. Tr. Vol. 7 at 168. Later, Hoffman returned and told Guidry that the police had obtained a statement from his accomplice, Joseph Prytash. Tr. Vol. 7 at 169. After Guidry read the statement, he "demanded" that the officers let him contact his attorney. Tr. Vol. 7 at 170. Hoffman asked who his attorney was and left the room, saying that he was going to talk to counsel. Tr. Vol. 7 at 170-71. Some time later, Hoffman returned, telling Guidry that he had talked to the attorney. Hoffman "said it was all right for [Guidry] to answer the questions and don't worry about it." Tr. Vol. 7 at 171-72. Guidry decided to cooperate with the police when he heard that his counsel had given him clearance to speak with the police. Tr. Vol. 7 at 175, 187, 191.

The defense supported Guidry's story with the testimony of the attorneys first appointed to represent him in the capital murder proceedings, Sylvia Yarborough and Robert Scott. They testified concerning an event that transpired in another state judge's chambers. On March 15, 1995, the trial court appointed Yarborough and Scott to represent Guidry on the capital murder charge. Tr. Vol. 7 at 104, 139. That day, those two attorneys, an Assistant District Attorney, another lawyer and two police officers (including Roberts) were in the judge's chambers. Tr. Vol. 7 at 105. One of the police officers indicated that the took Guidry's confession. Scott then asked Roberts "What do you mean taking Mr. Guidry out, getting in a–getting a confession when you knew he had a lawyer". Tr. Vol. 7 at 107. Roberts told him "I talked to his lawyer, and his lawyer said it was okay to talk to him." " I talked to his lawyer, and his lawyer said it was okay to talk to him." Tr. Vol. 7 at 108, 141-42. Another attorney present in the room, Deborah Gottilieb, confirmed the details of this conversation. Tr. Vol. 7 at 131-32.

Duer, Guidry's attorney from the aggravated robbery case,

testified that he head never been contacted by the police with respect to the Fratta murder and that he did not give them permission to speak to his client. Tr. Vol. 7 at 123-24. This testimony suggested that the police feigned a conversation with counsel in order to trick Guidry into confessing.

After the presentation of testimony, the trial court orally denied Guidry's motion to suppress. Tr. Vol. 7 at 213-14. The trial court stated that the in-chamber conversation only influenced the credibility of the witnesses, not the admissibility of the confession. Tr. Vol. 7 at 212.

At trial, the defense wished to place before the jury the question of whether guidry invoked his right to counsel. When trial counsel attempted to call Duer as a witness, the trial court questioned whether his testimony would present a question for the jury to decide. Regarding the conversation that occurred in chambers, the trial court stated "I'm perfectly satisfied that the–that the Scott, Gottilieb, Yarborough conversation, while the author of the conversation may very well be up in the air, the substance of the comment is not." Tr. Vol. 24 at 234-35. The trial judge, however, thought that this testimony would be immaterial "unless there is some testimony would be immaterial "unless there is some testimony somewhere from somebody, whether it direct or implicit, or circumstantial, that in fact, the defendant did not waive his rights and, in fact, asserted one or more of them. Unless that occurs, it doesn't make any difference what his lawyers told him." Tr. Vol. 24 at 240. Out of the jury's presence, the trial court then heard substantially the same evidence as presented in the suppression hearing. After considering that testimony, the trial court held that the evidence did not raise a question for the jury to consider regarding the waiver of Guidry's rights. Tr. Vol. 24 at 289-90.

After the conclusion of the trial and the initiation of Guidry's

appeals, the trial court issued findings of fact and conclusions of law explaining its decision. Tr. Vol. I-A at 423-29. The trial court extensively reviewed the testimony presented by the State at the suppression hearing. While the trial court discussed Guidry's own testimony, it did not address, much less issue findings of fact concerning, the testimony by the four attorneys. After considering the State's evidence, the trial court found that the police had warned Guidry of his constitutional rights and Guidry had waived those rights. Tr. Vol. I-A at 429. The trial court found that "at no time did [Guidry] state he wanted to have an attorney present prior to or during any questioning; at no time did he indicate he wanted an attorney present to advise him...." Tr. Vol. I-A at 430. The trial court concluded that Guidry had been informed of his rights at least five times and that he intelligently and knowingly waived those rights. Tr. Vol. I-A at 430. On direct review, the Court of Criminal Appeals rejected Guidry's complaint that the taking of his confession violated the Constitution, explicitly deferring to the findings of the trial court. *See Guidry*, 9 S.W.3d at 143.

This Court denied the respondent's original summary judgment motion based on Guidry's renewal of this claim on federal habeas review, finding that factual issues needed to be resolved concerning the voluntariness of Guidry's confession. At a hearing in this Court on December 13, 2002, the parties presented evidence relating to the voluntariness of Guidry's statements. Guidry called five witnesses at that hearing: himself, Layton Duer (his attorney for the unrelated aggravated robbery case), Robert Scott and Sylvia Yarborough (his initial attorneys in his capital murder case), and Debra Gottlieb (the other attorney present during the in-cambers conversation). With some variation from Respondent's witnesses, the testimony in that hearing strayed little from that presented in the various state-court proceedings. The hearing, however, allowed this Court to observe the testimony and demeanor of the witnesses. In the following paragraphs, the Court summarizes its factual findings

and observations from that hearing.

Guidry appeared to be a credible witness. Guidry testified that, while in custody for an unrelated crime, his counsel (Layton Duer) advised him not to speak with anyone about his case. (Instrument No. 26 at 16). Guidry testified that, subsequent to receiving that advise, Detectives Jim Hoffman and Ronnie Roberts transported him to another location for questioning about the Fratta murder. The Court finds from his credible testimony that Guidry twice informed the detectives that he had an attorney wand would not speak to them outside his counsel's presence. (Instrument No. 26 at 17, 27-28). The Court finds that the police officers then told Guidry that they would contact his attorney and left the room. (Instrument No. 26 at 18, 29). When the police officers returned some time later, Guidry testified that "[t]hey told me that they had contacted my attorney and a deal had been worked out where I could speak to [the police officers] and everything was going to be okay." (Instrument No. 26 at 18). Had this assurance not been made, Guidry testified that he would not have spoken to the police. (Instrument No. 26 at 19, 26).

The testimony of four attorneys (Duer, Scott, Yarborough, an Gottlieb) confirm Guidry's account. While not present at his confession, each of the lawyers provided testimony that enhanced Guidry's credibility. Three attorneys credibly recounted a conversation that occurred in the Honorable Harris County Judge Joe Kegans' chambers. On March 15, 1995, Scott, Yarborough, and Gottlieb overheard two police detectives talk about Guidry's confession. These attorneys testified that they heard the police officers state that Guidry's attorney gave them permission to interview him. (Instrument No. 26 at 38-39, 48-49, 59). When Scott asked Roberts how they were able to secure a confession from Guidry, Roberts said they "talked to Howard Guidry's lawyer. He said it was okay." (Instrument No. 26 at 48). In the evidentiary

hearing, Duer (who was not present during the in-chambers episode) testified that the police never contacted him and he never gave the police permission to interview Guidry. (Instrument No. 26 at 12). The Court finds each of the attorneys' testimony to be credible.

Respondent called the three police officers involved in taking Guidry's confession: Ronnie Roberts, Jim Hoffman, and Danny Ray Billingsly. Billingsly supervised Guidry's interrogation and took part in the videotaped walk-through, but only checked in on the interview "from time to time" and would not have known if the other officers concocted a story about counsel giving Guidry permission to confess. (Instrument No. 26 at 102-03). Each officer testified that Guidry never asked to speak to his counsel. (Instrument No. 26 at 67, 83, 86, 101). Hoffman stated that Guidry never told them that he was already represented by counsel in a separate case. (Instrument No. 26 at 83, 86). Problematically, and in direct contradiction to Hoffman's account (instrument no. 26 at 86), Roberts testified that Guidry told him that he was represented by counsel. (Instrument No. 26 at 66-67,69,72).

Roberts, the only police officer specifically identified as being in the state judge's chambers, testified that while he remembered speaking with Guidry's trial counsel in the chambers, Roberts never told Scott or Yarborough that he contacted Duer or that Duer gave Guidry license to confess. (Instrument No. 26 at 67, 71-72, 75). Having observed his demeanor, the Court explicitly finds Roberts testimony concerning both Guidry's confession and the conversation in the state judge's chambers not to be credible.

In light of the attorneys' testimony, the record, and this Court's own observation of the witnesses' demeanor, this Court finds the police testimony not to be credible with respect to the claim that Guidry never asked to speak to his counsel. This Court finds that

the police officers were aware that Guidry was represented by counsel and that they deceived Guidry by telling him that his counsel advised him to speak with them.

2. Invocation of his right to counsel

The main point of dispute in this case is Guidry's assertion that he requested to speak to his attorney. Throughout the legal proceedings that have considered the issue, Guidry has maintained that he made that request and the police have maintained that he did not. On direct review, the Court of Criminals Appeals recognized that "[t]here was conflicting testimony as to whether appellant requested his attorney during the interrogation." *Guidry*, 9 S.W.3d at 142. The Court of Criminal Appeals accepted the trial court's finding that the police had warned Guidry of his constitutional rights and that Guidry had waived those rights. Tr. Vol. I-A at 429. The trial court found that "at no time did [Guidry] state he wanted to have an attorney present prior to or during any questioning; at no time did he indicate he wanted an attorney present to advise him..." Tr. Vol. I-A at 430. The trial court made no findings with respect to the testimony from Scott, Yarborough, Gottlieb, and Duer. The trial court seemingly based its findings on a determination that Guidry's account was not as credible as the police officers' testimony. The trial court concluded that Guidry had been informed of his rights before his first confession and that he intelligently and knowingly waived those rights. Tr. Vol. I-A at 430. The Court of Criminal Appeals found "evidence in the record supporting these findings," *Guidry*, 9 S.W.3d at 143, concluding that "[b]ecause the trial court is in the best position to evaluate the credibility of the witnesses and their testimony," the Court of Criminal Appeals deferred to the lower court's findings. *Id.* at 143.

Respondent argues that this Court must defer to the state court's credibility determinations so long as they are supported by

the record. *See Wainright v. Goode,* 464 U.S. 78, 85 (1983); *Galvan v. Cockrell,* 293 F.3d 760, 764 (5th Cir. 2002); *Self v. Collins,* 973 F.2d 1198 (5th Cir. 1992), *cert. denied,* 507 U.S. 996 (1993). Each of the cases cited by Respondent, however, concerns a district court's inability to reconsider a state court's credibility determination on the basis of the record alone. Here, this Court's credibility evaluation focuses not on the cold record, but on the same live witnesses, and presumptively the same demeanor, as was presumably considered by the trial court. This Court's evaluation of the witnesses' credibility, therefore, extends beyond a mere review of whether the record supports the state-court determination. This Court's observation and judgment from the federal evidentiary hearing factor heavily into its habeas review and are made more important by virtue of the *limited* credibility analysis provided by the findings of the state court.

This Court understands that the state court's factual determinations must be treated with a great degree of deference. *See* 28 U.S.C. § 2254(e)(1); *Gachot,* 298 F.3d at 418 ("...the ultimate issue of voluntariness is a legal question requiring independent factual determination , subsidiary factual questions...are entitled to the § 2254(d) presumption.'") (quoting *Self,* 973 F.2d at 1204). Although the Court "must apply substantial deference to the findings of fact made by the state court in the course of deciding" the voluntariness of the confession, *Soffar,* 300 F.3d at 592, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell,* 537 U.S. 322, ____, 123 S. Ct. 1029, 1041 (2003). Deference by no means requires this court to ignore its own observations, thus rendering the evidentiary hearing an "exercise in futility." *Valdez v. Cockrell,* 274 F.3d 941, 952 (5th Cir. 2001), *cert. denied,* ___ U.S. ___, 123 S. Ct. 106 (2002). The AEDPA preserves the federal court's ability to "disagree with a state court's credibility determination and, when guided by [its

standards[, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El,* 537 U.S. at __, 123 s. Ct. at 1041.

This Court's review of the record, the witnesses' testimony, and particularly their demeanor, compels the conclusion that Guidry asked to speak with his counsel. The testimony presented by Guidry in the federal evidentiary hearing, and the inferences stemming from the four attorneys' testimony, constitutes clear and convincing evidence tht would rebut any presumption that the police testimony was credible. The police officers, and most particulary Roberts, offered contradictory and changing testimony throughout all the proceedings examining this issue. At times Roberts acknowledged that he knew that counsel represented Guidry, at other times he professed ignorance to that fact. At times Roberts acknowledged speaking with Scott in the trial judge's chambers, at other times he did not. Further, Roberts provided no satisfactory explanation for his knowledge that Guidry had an attorney, leaving the strong inference that he gained that information when Guidry asked to speak to his counsel. This Court finds that the police officers have not been credible witnesses in this case.

Even though the factual basis for this claim rests on conflicting evidence, independent evidence corroborating Guidry's account establishes the veracity of his claim. The affair in the state judge's chambers strongly bolsters Guidry's credibility and eviscerates Respondent's position. Three attorneys overheard police officers concoct a story which shows they used subterfuge to obtain Guidry's confession. As recognized by the trial court, this conversation strongly influences a determination of the witnesses' credibility. Tr. Vol. 7 at 211-13. Yet the trial court apparently failed to take the inferences flowing from that conversation into account when rendering its decision. The in-chambers conversation

presupposes that Guidry asked to speak to counsel. The police would have no reason to tell him that his counsel authorized his confession if he did not ask to speak to counsel. The evidence lends credibility to Guidry's claim that the police tricked him into confessing.

Respondent does not argue that the petitioner made an ambiguous or equivocal request for counsel, only that he did not make that request. See *Davis v. United States*, 512 U.S. 452,459 (1994) (requiring a defendant to make a request "that can reasonably be construed to be an expression of a desire for the assistance of an attorney"). The Court finds that Guidry has presented clear and convincing evidence that he invoked his right to counsel and that the police ignored that assertion. In light of the evidence presented in state court, the state courts unreasonably determined that Guidry did not invoke his right to counsel. *See Wiggins v. Smith*, ____ U.S. ____, ____, 123 S. Ct. 2527, 2539 (2003) (applying 28 U.S.C. § 2254(d)(2)'s analysis after determining that a petitioner met is burden under 28 U.S.C. § 2254(e)(1) with respect to a mixed question of law and fact). The state courts rendered an unreasonable application of federal law in finding that Guidry did not invoke is right to counsel. *See* 28 U.S.C. § 2254(d)(1).

3. Waiver of his right to counsel

Having found that Guidry invoked his right to counsel, the Court must decide whether he then waived his right. The Supreme Court has established a "bright-line" rule. "[A]n accused...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484. In reviewing whether an accused waived his Fifth Amendment rights in a knowing and voluntary manner, a court must address two questions: (1) was the

waiver the product of intimidation, coercion, or deception; and (2) was the waiver made with a full awareness of his constitutional rights? *See Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Hopkins v. Cockrell*, 325 F.3d 579, 583 (5th Cir. 2003). "In order for a defendant to establish that his confession was involuntary, he must demonstrate that it resulted from coercive police and it is essential that there be a link between the coercive conduct of the police and the confession of the defendant." *Hopkins,* 325 F.3d at 584 (citing *Colorado v. Connelly*, 479 U.S. 157, 163-165 (1986)).

Here, Guidry asked to speak with his attorney. Instead of honoring that request, the police officers fabricated a conversation with Guidry's counsel. While "[n]either mere emotionalism and confusion, nor mere trickery will alone necessarily invalidate a confession," *Self*, 973 F.2d at 1205, the police officers went far beyond any deception that would be tolerable under the Constitution. Here, the police interfered with Guidry's constitutionally guaranteed right to counsel.

"The purpose of the *Miranda-Edwards* guarantee...and hence the purpose of invoking it is to protect...the suspect's desire to deal with the police only through counsel[.]'" *McNeill v. Wisconsin*, 501 U.S. 171, 178 (1991) (quoting *Edwards*, 451 U.S. at 484). While Guidry signed a waiver of his rights and received a recitation of his *Miranda* rights in the videotaped walk-through of the crime scene, those events occurred *after* Guidry invoked is right to counsel, and, according to his credible testimony, only *because* Guidry believed counsel had advised him to speak freely with the police. The police deception caused Guidry to waive his right under a misapprehension of the full circumstances surrounding that waiver. The trial court erred in not suppressing Guidry's confession. The state court's conclusion that Guidry voluntarily confessed does not withstand scrutiny under the AEDPA. Respondent, nonetheless, argues that error was harmless.

4. Harmlessness

Notwithstanding a petitioner's ability to show that a state court

decision is erroneous under 28 U.S.C. § 2254(d), that "does not *require* federal habeas courts to grant relief reflexively." *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003); *see also Horn v. Banks*, 536 U.S. 266, 272 (5th Cir. 2002) (stating that no Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a petitioner satisfies the AEDPA standard[.]"); *Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) (finding that 28 U.S.C. § 2254(d) does not entitle a petitioner to habeas relief), *cert. denied*, ____ U.S. ____, 123 S. Ct. 2653 (2003)). A habeas corpus petitioner meeting his burden under 28 U.S.C. § 2254(d) must still comply with 28 U.S.C. § 2254(a); he must show that "he is in custody in violation of the Constitution or law and treaties of the United States." This includes a showing that any constitutional error at trial "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (19930); *see also Aleman*, 320 F.3d at 690 ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome"). Unquestionably, the wrongful introduction of a confession is subject to a harmless-error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1991); *Hopkins*, 325 F.3d at 583. This Court's harmlessness inquiry asks whether evidence independent from his confession sufficiently established Guidry's guilt beyond a reasonable doubt. *See Johnson v. Cain*, 215 F.3d 489, 497 (5th Cir. 2000).

Respondent points to several factors that would suggest Guidry's responsibility for the Fratta murder. Guidry possessed the murder weapon. Eyewitness testimony suggested that someone wearing the same color clothes as Guidry did the night of the murder fled from the murder scene in a car similar to Prystash's. Prystash's girlfriend, Mary Gipp, testified that Prystash agreed to kill the victim for profit. Her testimony also established that

Prystash and Guidry were friends. However, only Guidry's own confession and the hearsay testimony offered by Gipp explained Guidry's precise role in the murder-for-hire scheme.

The trial court's instructions allowed for Guidry's conviction of capital murder if the evidence showed beyond a reasonable doubt that (1) he murdered the victim for the remuneration of either a vehicle or money from either her husband or Prystash or (2) Prystash murdered the victim for remuneration from the husband and Guidry acted as a "party" to the offense. Tr. Vol. I-A at 385-87, Vol. 25 at 20-26. The trial court instructed the jury that "[m]ere presence alone will not constitute one a party to an offense." Tr. Vol. I-A at 385, Vol. 25 at 20. Therefore, under the second basis for conviction, Guidry could only be found guilty of capital murder if "with the intent to promote or assist the commission of the offense, if any, [he] solicited, encouraged, directed, aided, or attempted to aid Joseph Andrew Prystash to commit the offense, if he did." Tr. Vol. I-A at 385-87.

Removing the confession from the evidentiary picture, and Gipp's hearsay testimony for reasons which will be discussed *infra*, the Court finds that the trial evidence did not support a capital-murder conviction beyond a reasonable doubt. The absence of that damning evidence leaves the jury without a basis to determine that either Prystash or Fratta hired Guidry to commit the murder. While the trial evidence showed that someone of the same race and wearing the same clothes as Guidry was present at the murder scene, such evidence alone would be insufficient to show Guidry's complicity as a party to the offense. *See Isham v. Collins*, 905 F.2d 67, 69 (5th Cir. 1990). To support a capital-murder conviction, the evidence must show more than just Guidry's presence at the scene; Guidry must have intentionally or knowingly caused the victim's death. *See* TEX. PENAL CODE § 7.02(a), 19.03(a). The fact that Guidry possessed the murder weapon some time after the murder

fails to prove that he formed the requisite intent before the murder to justify a conviction for capital murder. *See Isham*, 905 F.2d at 70. This is especially true as the weapon belonged to Prystash and Gipp saw him, rather than Guidry, with the weapon immediately after the murder. Tr. Vol. 23 at 61, 79-80.

As discussed in the section that follows below, the Court finds that the trial court also erred in allowing the introduction of Gipp's hearsay-laden testimony. Had the trial court properly considered the credibility of the witnesses in the suppression hearing, and had that court prevented the introduction of hearsay testimony, the jury would have been left without a sufficient basis to find Guidry guilty of capital murder for renumeration. Thus, the introduction of Guidry's confession substantially and injuriously influenced the jury's verdict. Respondent's summary judgment motion will be denied on this ground. This Court will grant a provisional writ of habeas corpus on Guidry's claim that the police took his confession in violation of the Constitution.

B. Introduction of Hearsay Testimony

Guidry argues that the introduction of hearsay testimony at his trial violated his rights under the Confrontation Clause of the Sixth Amendment. Guidry points to six statements made during the testimony of Mary Gipp, Joseph Prystash's girlfriend. Gipp's testimony centered on hearsay statements made by Prystash before and after the murder. Gipp's hearsay-laden testimony contained statements Prystash made against his penal interest alone, as well as ones implicating Guidry in the murder-for-hire scheme. In the latter category, Gipp testified that Prystash told her that he was going to take Guidry to the Fratta house on the night of the murder (Tr. Vol. 23 at 73); he and Guidry had killed Fratta (Tr. Vol. 23 at 83); Guidry shot Fratta in the head as she exited her vehicle (Tr. Vol. 23 at 92); he picked up Guidry after the murder (Tr. Vol. 23 at

92-93); Guidry was to receive $1,000 from the murder (Tr. Vol. 23 at 102-03); and he would pick up Guidry's $1,000 from Fratta's husband (Tr. Vol. 23 at 85). Trial counsel objected to both categories of hearsay testimony repeatedly, but to no avail.

On direct review, the State conceded that Gipp's testimony contained hearsay. *See Guidry*, 9 S.W.3d at 147. The Court of Criminal Appeals found that Prystash's statements against his own penal interest were admissible under Texas' Rules of Evidence and also did not violate the Confrontation Clause. *See Guidry*, 9 S.W.3d at 149, 150-51. The introduction of those statements is not at issue on federal review. Relevant to the current claim before this Court, the Court of Criminal Appeals held that Prystash's statements against Guidry's interest were not admissible under Texas law. *See id.* at 149. The Court of Criminal Appeals found that it was "doubtful" that those statements possessed any guarantee of trustworthiness to overcome the presumptive unreliability of hearsay testimony. *Id.* at 151. Nonetheless, the Court of Criminal Appeals found that the hearsay statements "did not contribute to [his] conviction or punishment." *Id.* The Court of Criminal Appeals pointed to trial evidence that rendered the effect of the statements harmless: (1) Guidry's confession; (2) Gipp's properly introduced testimony implicating Prystash, and by extension Guidry, in the killing; (3) eyewitness testimony implicating both Guidry and Prystash in the murder; and (4) Guidry's possession of the murder weapon. *Id.* at 151-52. On that basis, the Court of Criminal Appeals found "beyond a reasonable doubt...[that the] admission of Prystash's statements regarding [Guidry's] participation in the offense did not contribute to his conviction or punishment." *Id.* at 152.

In this forum, Guidry argues that the introduction of Gipp's hearsay-laden testimony violated his Confrontation Clause rights and that its introduction harmed his defense. The Confrontation

Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The Confrontation Clause anticipates " a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they make look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). Accordingly, the admission of hearsay evidence violates the Constitution unless "the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused" such as "when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trust worthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999) (quoting *Roberts*, 448 U.S. at 66).

Contrary to the holding of the Court of Criminal Appeals, Respondent argues, albeit in a footnote, the Gipp's hearsay testimony implicating Guidry in the murder-for-hire scheme possessed particularized guarantees of trustworthiness that would justify its admission into evidence. (Instrument No. 30 at 35 n. 11). Respondent argues that Prystash made those statements spontaneously and voluntarily, without the effects of coercion or intoxication, and without minimizing his own complicity in the murders. It is true that "[w]hen a court can be confident -- as in the context of hearsay falling within a firmly rooted exception -- that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, ' the Sixth Amendment's 'trustworthiness' test allows the admission of the declarant's statements." *Lily*, 527 U.S.

at 136 (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1999)). This exception however, only applies in an "exceptional case." *Lily*, 527 U.S. at 136.

Here, the Court of Criminal Appeals found it "doubtful" that Prystash's statements
"possessed 'particularized guarantees of trustworthiness' to overcome the presumption of hearsay unreliability." *Guidry*, 9 S.W.3d at 151. This Court concurs in that judgment. Prystash had ever reason to spread the blame for Fratta's death and inculpate others in the murder-for-hire. Importantly, the record gives no particular basis upon which to gauge Prystash's credibility when he made those statements. This Court will not upset the holding of the Court of Criminal Appeals that Gipp's hearsay-laden testimony inculpating Guidry in the murder violated the Confrontation Clause.

The Court of Criminal Appeals found, however, that Gipp's testimony did not contribute to Guidry's conviction or sentence. The support for that court's harmlessness determination was based on two categories of evidence: (1) the additional evidence showing that Guidry killed Fratta; and (2) Guidry's confession that he committed that murder for remuneration. Yet only two pieces of evidence showed that Guidry killed Fratta *for remuneration* or that he acted as a "party" to the murder: his own confession and Prystash's out-of-court statements. The remaining evidence showed his possible presence at the scene and his possession of the murder weapon months after the killing– evidence insufficient to support a capital-murder conviction when standing alone.

As this Court has already held that the trial court erred in not suppressing Guidry's statements, the hearsay testimony served as an indispensable piece of evidence to convict Guidry of capital murder. Simply put, Gipp's testimony had both a substantial and an injurious effect in determining the jury's verdict. *See Brecht*, 507

U.S. at 637. In conjunction with Guidry's Fifth Amendment claim, this claim merits federal habeas relief. Respondent's summary judgment motion will be denied on this ground.

C. Prosecutorial Misconduct in Referring to Robert Fratta's Death Sentence

Prior to Guidry's trial, both Robert Fratta and Joseph Prystash received death sentences for there involvement in Farah Fratta's murder. Guidry claims that the State violated his due process rights during punishment phase closing arguments by referring to the fact that Robert Fratta had already been sentenced to die. The Court reviews the state court's rejection of this claim under 28 U.S.C. § 2254(d)(1).

The defense focused its closing argument, in part, on convincing the jury that a fourty-year period before parole eligibility would be a sufficient punishment. Tr. Vol. 27 at 74-80. The defense pointed out that, if given a life sentence, Guidry could not be paroled until he was at least sixty-years old. While explaining that Fratta's parents now cared for her three children, the State argued as follows:

> The State: Now, [Farah Fratta's parents] are 60 now. They are over 60 now. And the argument is that poor boy [Guidry] will be 60 if he gets life. They're 60 now and what are they doing now? What are they Doing now? After they've retired, after they've paid all those years like you and I have, what are they doing now? They're raising three kids like they are brand new newly

weds. They are raising three kids. There is no mother. *The father is on death row.* They are raising three children.

Defense Counsel: Your, Honor, we object to that. That's outside the record. We had that issue before and he knew he wasn't supposed to bring that up.

The Court: The Jury heard the testimony of witnesses that were presented. What the lawyers say is not evidence. *The Jury will be governed by the testimony you remember having heard.*

Defense Counsel: Judge, may I have a ruling on my abjection?

The Court: That's the ruling, sir.

Defense Counsel: Your Honor-

The Court: *What the lawyers say is not evidence.*

Defense counsel: Is my objection overruled or–

The Court: No, sir, it's not overruled.

Defense Counsel: –sustained? Well, then, Your Honor, we ask for an instruction that This Jury be instructed to disregard [the State's] last comments.

The Court:	*Ladies and gentlemen, disregard any comments that were not raised by the evidence.*
Defense counsel:	Your Honor, we move for a mistrial.
The Court:	That's denied.

Tr. Vol.27 at 99-101 (emphasis added).

After sentencing, the trial court denied a motion for new trial based on the State's comments. *See* Statement of Facts, Motion for New Trial at 41. On direct review, Guidry contended that the State improperly exceeded the permissible scope of closing argument by intentionally commenting on Robert Fratta's death sentence. Guidry insisted that the statement allowed the jurors to abdicate their responsibility to consider the evidence alone, allowing them to impose a death sentence solely because Robert Fratta sat on death row. In essence, Guidry argued that the prosecution's statement violated the reliability of the sentencing process as in *Caldwell v. Mississippi,* 472 U.S. 320 (1985): the comments "presented an intolerable danger that the jury will in fact choose to minimize the importance of its role...." Guidry emphasized that in jury selection several jurors opined that those defendants engaged in criminal conduct together should be punished equally.

Amendment claim, this claim merits federal habeas relief. Respondent's summary judgment motion will be denied on this ground.

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The Court of Criminal Appeals rejected Guidry's claim, finding that the trial court instructed the jury to disregard the State's comment. Specifically, the Court of Criminal Appeals held that "[e]ven assuming there is no evidence in the record that mentions the co-defendant's case and/or sentence, the instruction given to the jury to disregard the prosecutor's statement was prompt and sufficient to cure the error." *Guidry*, 9 S.W.3d at 154.

Guidry renews this claim in his federal petition. A federal habeas cour't review of prosecutorial misconduct claims is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642

(1974)). Accordingly, "[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *United States v. Bernard*, 299 F.3d 467,488 (5th Cir. 2002) (quoting *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir. 1989)), cert. denied, __U.S.__, 123 S.Ct. 2572 (2003)' see also *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001) ("Prosecutorial misconduct is not a ground for relief unless it casts serious doubt upon the correctness of the jury's verdict."), cert. denied, 534 U.S. 1163 (2002); *Ortega v. McCotter*, 808 F.2d 406, 408 (5th Cir. 1987) ("A prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most eregious cases."). This Court's focus is on "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (internal quotations and citations omitted).

Under Texas law, closing arguments must be based on trial evidence, the logical assumptions flowing from the evidence, a response to defense argumentation, or a plea for law enforcement. *See* Wilson v. State, 7 S.W.3d 136, 147 (Tex. Crim. App. 1999). In its decision, the Court of Criminal Appeals assumed that the State argued outside of the trial evidence in commenting on Robert Fratta's death sentence. Neither party has demonstrated that the State offered permissible argument. However, the impropriety of the Stat's argument does not alone require federal habeas relief. The Court of Criminal Appeals rejected Guidry's prosecutorial misconduct claims based on the efficacy of the trial court's curative instruction. Courts presume that juries follow their instructions. *See Zafiro v. United States*, 506 U.S. 534, 539-40 (1993) ("[J]uries are presumed to follow their instructions."); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the

absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant."). This presumption exists "unless there is an overwhelming probability that the jury will b e unable to follow the instruction and there is a strong probability that the effect [of the prosecutorial misconduct] is devastating." *United States v. Tomblin*, 46 f.3d 1369, 1390 (5th Cir. 1995) (internal quotation marks and citation omitted); see also *United States v. Wyly*, 193 F.3d 289, 299 (5th Cir. 1999).

In this case, the trial court swiftly and effectively informed the jury to disregard any statement unsupported by trial evidence. Nothing would suggest that the State's improper argument rendered Guirdry's trial fundamentally unfair. The State presented considerable evidence that would demonstrate Guidry's future danger to society. The trial court properly instructed the jury to consider Guidry's individual mitigating evidence. While the State referred to Robert Frattaa's death sentence, it only briefly mentioned that fact and did not argue that Guidry's punishment should rest on his co-conspirators' sentences. There is no indication that the jury could not follow the trial court's admonition.

Considering the State's improper comment in the context of the whole proceedings, the Court finds that Guidry's "trial was not perfect–few are–but neither was it fundamentally unfair." Darden, 477 U.S. at 183 (quotation omitted). The state court could reasonably conclude that the challenged comment did not result in a fundamentally unfair trial. Guidry has not demonstrated that the state court's determination was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Summary judgment in Respondent's favor is appropriate on this claim and will be granted.

D. Denial of an Impartial Jury Due to the Seating of a Juror Who Could Not Consider Age as a Mitigating Factor

Guidry claims that the trial court's failure to excuse juror Audrey Helton for cause violated his Sixth Amendment fight to an impartial jury. Guidry argues that the Constitution requires a trial court to remove for cause any juror who cannot consider a specific type of mitigating evidence, such as a defendant's youth at the time of the crime. Guidry contends that Ms. Helton's refusal to consider the mitigating effect of his youth impaired her ability to serve as an impartial juror.

During voir dire, the State explained to Ms. Helton that, if Guidry received a life sentence, he would be ineligible for parole for forty years. Tr. Vol. XIX at 93-94. After explaining the parole implications of a life sentence, the State engaged her in the following colloquy:

The State:	How do you feel about age being a factor to be considered in this issue No. 2?
Ms. Helton:	I don't consider that a factor.
The State:	Okay. Now, listen to what you just said. Remember that the key word up there in No. 2: Do you find that taking into consideration. Consider means that you sit here right now with an open mind to consider whatever the evidence might be. And you just told me: I don't consider age a factor. You gave me a blanket

statement. I do not consider age. What if you had a defendant who was 99 years old? What if you had somebody with a terminal illness? I mean, just to say I'm never going to consider age, that means that you're closing your mind off to whatever the evidence might be when the trial starts. You see where I'm coming from?

Ms. Helton: No. I can tell you where I'm Coming from.

The State: Okay.

Ms. Helton: If it's a crime and we find him guilty–or she–he, whomever. And the only choices we have are these choices and 40 years is the death–the life sentence, it would not matter to me if he were 99 years old or he were 20 years old.

The State: Okay.

Ms. Helton: If that were the penalty, and that was the only choice that we had, you'd have to reach that decision or not reach that decision.

The State: Based on-

Ms. Helton: I wouldn't on the evidence that–that's

presented in Court.

The State: Okay. So, you're thinking there is other evidence that you're going to hear to help you decide what the right answer should be?

Ms. Helton: No. I'm going from the fact–maybe I've misconstrued the question. I construed the question to be if we find a defendant–on the second question we're debating whether life sentence or a death penalty. Well, in those two cases, from what you're telling me, it would be 40 years or the death penalty.

The State: Keep going.

Ms. Helton: Then I would, it would not mater to me how old that defendant was.

The State: Okay.

Ms. Helton: In making that decision we considered all the evidence that was presented.

Tr. Vol. XIX at 94-96.

During the defense's questioning, Ms. Helton continued to display an inability to accord evidence of Guidry's youth any mitigating weight:

Defense Counsel: And are you willing to give [mitigating evidence] fair consideration under Special Issue No. 2?

Ms. Helton: Yes, ma'am.

Defense Counsel: No, I know you mentioned it and I guess I need you to explain it a little bit further for me because there was a lot of conversation regarding the closure and the 40 year life definition for you. You mentioned that youth–and I think it was discussed in terms of age. And I'm literally hitting on youth now as opposed to age being a factor of consideration. Okay. Not whether or not it will make a true difference to you in the end once you review all the evidence. But can you consider that as a factor under Special Issue No. 2?

Ms. Helton: No, ma'am.

Defense Counsel: You cannot ever?

Ms. Helton: I can't say ever. But as I said before, if a person's convicted or proven to me beyond a reasonable doubt that he is guilty and we were given two options, then his age would not have a factor in my decision.

Defense Counsel: Okay.

Ms. Helton: And in this case, as I'm talking, it's 40 years as opposed to life if we've gotten to that point. And I would not consider a defendant's age in making that decision.

Tr. Vol. XIX at 119-20. Defense counsel then asked Ms. Helton if she could envision any circumstances that would militate against the imposition of a death sentence. Tr. Vol. XIX at 121. Ms. Helton responded that, while she did not consider family circumstances or drug usage to be mitigating, some circumstances would make her consider a life sentence. Tr. Vol. XIX at 122. Defense counsel challenged Ms. Helton for cause because she "stated that age or youth could never be a relevant mitigating factor for consideration under Special Issue No. 2 because of her newly learned information about what life really means and there is a possibility for parole." Tr. Vol. XIX at 125-26. The trial court denied the challenge for cause. Tr. Vol. XIX at 126.

After the voir dire of all potential jurors, the parties used their peremptory challenges. The defense had already expended all of its peremptory challenges before considering Ms. Helton. Trial counsel sought an additional peremptory challenge to use on Ms. Helton, but the trial court denied that request. Tr. Vol. XXI at 25-26. Ms. Helton served as a juror in this case.

On state habeas review Guidry argued that Ms. Helton's inability to consider age as a mitigating factor made her challengeable for cause. The state habeas court concluded that youth is not a mitigating circumstance as a matter of law, and, therefore, "[a] juror is not challengeable for cause for refusing to consider the age of a defendant when determining future

dangerousness." State Habeas Record at 144-45 ¶¶ 8-9. Additionally, the state habeas court found that the trial court properly denied the challenge for cause as Ms. Helton was "willing to listen to the evidence, base her decisions upon the law and the evidence, and be willing to consider a life sentence in some circumstances." State Habeas Record at 145 ¶ 10 (emphasis added).

Guidry renews his claim in this forum. The exclusion of potential jurors is a question of fact. *See McCoy v. Lynaugh*, 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). "A state trial court's refusal of a petitioner's challenge for cause is a factual finding entitled to a presumption of correctness." *Miniel v. Cockrell*, 339 F.3d 331, 338-39 (5th Cir. 2003); see also 28. U.S.C. 2254(e)(1). Juror Helton demonstrated a general willingness to consider mitigating evidence, as reflected in the state habeas court's factual findings. While the state habeas court's factual findings must be respected on federal review, the Court must decide the underlying legal question of whether a juror who refuses to consider specific mitigating evidence may serve in a capital trial. The state court's treatment of this legal question is reviewed under 28 U.S.C. § 2254(d)(1).

The Sixth Amendment of the Constitution guarantees that a criminal defendant will be tried by a jury comprised of impartial individuals. See U.S. Const. amend. VI. United States Supreme Court precedent ensures the impartiality of any capital; sentencing jury in state court through both the Sixth and Fourteenth Amendments. *See Ross v. Oklahoma*, 487 U.S. 81,85 (1988); *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); *Adams v. Texas*, 448 U.S. 38, 40 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968). In *Wainwright v. Witt*, the Supreme Court clarified the "proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment[:] ... whether the juror's views would 'prevent or

substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." 469 U.S. at 424 (quoting Adams, 338 U.S. at 45). Based on the Constitution's guarantee of an impartial jury, a trial court's failure to remove a partial juror for cause results in a constitutional violation. *See Ross*, 487 U.S. at 85. Guidry claims that a potential juror's refusal to consider a defendant's age as a mitigating factor impairs that juror's ability to serve.

Significant Supreme Court authority emphasizes the importance of a sentencer's ability to evaluate mitigating evidence. "To provide the individualized sentencing determination required by the Eighth Amendment... the sentencer must be allowed to consider mitigating evidence." *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989). Indeed, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 2 U.S. 80, 304 (1976) (plurality opinion). The Supreme Court has concluded "that the Eighth and Fourteenth Amendments require that [a capital] sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982). While a trial judge, and reviewing courts, "may determine the weight to be given relevant mitigating evidence," they "may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15.

Guidry argues that *Morgan v. Illinois*, 504 U.S. 719 (1992),

required the dismissal of Ms. Helton. In Morgan, the trial court denied the defendant's request to question potential jurors if they would automatically impose a death sentence after finding the defendant guilty. After reviewing the case law pertaining to the qualification of capital jurors and highlighting the constitutional importance of mitigating evidence in the punishment phase, the Supreme Court recognized that any juror that would automatically vote to impose a death sentence shows a refusal to consider mitigating evidence. *See id.* at 738. Accordingly, "[a]ny juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Id.* at 739. The Supreme Court opined that "such jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Id.* at 737. This attitude limits the jury's ability to follow the state capital punishment procedure and obey his oath. *See id.* at 738.

Here, Ms. Helton did not state that she would automatically deliver a death sentence, universally refusing to consider mitigating evidence. Instead, she appeared willing to consider mitigating evidence in general, but would not accord a specific type of evidence (age) any mitigating effect. Citing Texas precedent, the state habeas court held that "[a] juror is not challengeable for cause for refusing to consider the age of a defendant when determining future dangerousness." State Habeas Record at 144 ¶ 9. This statement accurately reflects Texas law. The Court of Criminal Appeals has held that "[i]t is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give *a particular variety* of mitigating evidence any consideration." *Banda v. State*, 890 S.W.2d, 42, 54 (Tex.Crim.App.

1994) (emphasis added), cert. denied, 515 U.S. 1105 (1995). The Texas courts hold that Supreme Court precedent does not require that "a prospective juror must give any amount of weight to any particular fact that might be offered in mitigation of punishment ..." *Cordova v. State*, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1240 (1988). Therefore, "[t]he amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion exercised by each juror." Id. at 189 (quoting *Adams*, 448 U.S. at 46); see also *Cuevas v. State*, 742 S.W.2d 331, 346 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 1015 (1988). The Court of Criminal Appeals has repeatedly held that "[t]he mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge fo4r cause ..." *Johnson v. State*, 773 S.W.2d 322, 331 (Tex. Crim. App. 1989), *aff'd on different grounds sub nom., Johnson v. Texas*, 506 U.S. 1090 (1993); see also *Johnson v. State*, 68 S.W.3d 644, 656 (Tex. Crim. App. 2022); *Prystash v. State*, 3 S.W.3d 522, 526 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000); *Soria v. State*, 933 S.W.2d 46, 65-66 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1253 (1997).

Texas' application of Morgan and its underlying principles to this and similar cases comes before the Court in the limited context of habeas review. Ultimately, this Court's focus under 28 U.S.C. § 2254(d)(1) is not whether a constitutional defect tainted Guidry's trial and conviction. Rather, this Court's limited review of the legal question asks only whether the Texas determination was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

Guidry's claim finds support in Justice Scalia's dissenting opinion in *Morgan*. There, the three dissenting justices noted that "[t]he fact that the jury has the discretion to deem evidence to be

mitigating cannot establish that there is an obligation to do so. Indeed, it is impossible in principle to distinquish between a juror who does not believe that *any* factor can be mitigating from one who believes that a particular factor ... is not mitigating." *Morgan*, 504 U.S. at 743 n.3 (Scalia, J., dissenting). Parenthetically, the dissent then adds the following: "Presumably, under today's decision a juror who thinks 'bad childhood' is never mitigating must also be excluded." *Id.* The dissent's reading of the Morgan decision supports Gudry's interpretation of the Morgan decision.

The Fifth Circuit has not directly ruled on the instant issue. In Soria v. Johnson, 207 F.3d 232, 245 (5th Cir. 2000), the Fifth Circuit considered a petitioner's claim that a potential juror refused to consider youth as a mitigating circumstance. In reviewing that claim, the Fifth Circuit stated ":because the voir dire examination of [the potential juror] indicates that he could not consider a defendant's youth in mitigation of the death penalty, it appears that [his] views were such that he should have been excluded for cause." Id. at 245 (citing Eddings, but not relying on Morgan). The Fifth Circuit emphasized the portion of the Eddings decision that stated that "a sentencer may not 'refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* In *Soria*, however, the Fifth Circuit did not ultimately decide the issue because the petitioner had removed the objectionable juror with a peremptory challenge. Respondent, therefore, attempts to distinguish *Soria* based on its discussion of the issue in *dicta*. Further, Respondent argues that the AEDPA review should focus on Supreme Court precedent, not the Fifth Circuit's interpretation of that precedent. (Instrument #9 at 20 n.10).

As a practical matter, this Court is governed by Fifth Circuit precedent and its interpretation of federal law. The question before the Court on habeas review, however, does not focus on the weight of authority accorded Fifth Circuit dicta; rather, the Court must

evaluate the state court's application of Supreme Court precedent. See 28 U.S.C.2254(d)(1).

While Soria based its dicta on the Eddings case, that case does not govern the issue before the Court. *Eddings* "relate[s] to restrictions on 'input,' not the subsequent deliberation process." *McKoy v. North Carolina*, 494 U.S. 433, 477 (1990) (Blackmun, J., concurring). *Eddings* focuses on whether there exists a "legal i8mpediment to the consideration of evidence," rather than a factual question about what weight, if any at all, to accord mitigating evidence. Id. It is far different to say that the government cannot prevent the consideration of mitigating evidence than to say that a jury must consider a particular circumstance to be of a mitigating character. While *Eddings* protects a defendant's ability to present mitigating evidence, it by no means requires the jury to afford that evidence any specific measure of weight. The Fifth Circuit's reliance on Eddings in the Soria case does not require this Court to afford habeas relief here.

The Supreme Court in *Morgan* required that a juror not be disposed to impose the death penalty automatically; a juror must be able to consider mitigating factors generally. The Supreme Court has not interpreted its *Morgan* decision in a way requiring jurors to give mitigating effect to a particular type of mitigating evidence. Lower federal courts have given Morgan a narrow reading. Elsewhere, the Fifth Circuit has held that *Morgan* only "involves the narrow question of whether, in a capital case, jurors must be asked whether they would automatically impose the death penalty upon conviction of the defendant." *Trevino v. Johnson*, 168 F.3d 173, 182 (5th Cir.) (citing *United States v. Greer*, 968 F.2d 433, 437 n.7 (5th Cir. 1992)), *cert. denied*, 527 U.S. 1056 (1999); *United State v. Chandler*, 996 F.2d 1073, 1103 (11th Cir. 1993). Federal courts have held that *Morgan* does not require a trial court to question potential jurors how they would vote if presented specific

mitigating evidence. See *United States v. McVeigh*, 153 F.3d 1166, 1208 (10th Cir.), cert. denied, 526 U.S. 1007 (1998); *Sellers v. Ward*, 135 F.3d 1333, 1340-42 (10th Cir.), *cert. denied*, 525 U.S. 1024 (1998).

While Guidry's claim finds some support in both dicta and dissenting opinion, federal habeas review requires him to show that the state determination was an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *Morgan* does not explicitly hold that jurors must consider specific types of mitigating evidence, only that they not automatically dismiss all mitigating evidence in their punishment-phase decision. Federal courts limit *Morgan* to its explicit holding. While *de novo* review of this claim might persuade the Court that the Constitution requires jurors to be able at least to consider each variety of mitigating evidence, clearly established federal law does not dictate such a result on habeas review. Under the Court's limited habeas review, the Court cannot say that the Texas' approach to an individual consideration of mitigating evidence is contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1).

The state court found that Ms. Helton would be an impartial juror. Based on the discussion above, the governing precedent, and the record, that was not an unreasonable determination. See 28 U.S.C. § 2254(d)(2). The Court will grant Respondent's summary judgment motion with respect to this claim.

IV. Certificate of Appealability

Although Guidry has not yet requested a Certificate of Appealability ("COA") on the two claims denied in this Order, the issue of a COA is likely to arise. This Court may deny a COA *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). The Supreme Court has explained the standard for

evaluating the issuance of a COA as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 2253© is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where ... the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also Miller-El*, 537 U.S. at __, 123 Ct. at 1039-40.

The Court has carefully considered each of Guidry's claims. While the claims denied by this Court deserve close scrutiny, the Court finds that each of them in foreclosed by clear, binding precedent. Under the appropriate standards, this Court concludes that Guidry has failed to make a "substantial showing of the denial of a constitutional right" with respect to each issue denied by this Court. 28 U.S.C. § 2254(c)(2). This Court concludes that Guidry is not entitled to a COA.

V. Conclusion

For the foregoing reasons, the Court **ORDERS** the following:

1. Petitioner Howard Paul Guidry's Petition for Writ of Habeas Corpus (Instrument No. 6) is provisionally **GRANTED** with respect to his claims involving his confession and the hearsay testimony given at trial. Respondent's summary judgment motion on those grounds is **DENIED**.

2. Respondent Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division, shall release Petitioner Howard Paul Guidry from custody unless within 180 days the State of Texas conducts a new trial. The 180-day time period shall not commence until the conclusion of any appeal from the portion of this Order that denies federal habeas relief, either by the exhaustion of appellate remedies or the expiration of the time period in which to file such appellate proceedings.

3. Respondent Janie Cockrell's Motion for Summary Judgment (Instrument No. 30) is **GRANTED** with respect to all other claims.

4. With the exception of the aforementioned issues, Petitioner Howard Paul Guidry's Petition for Writ of Habeas Corpus id **DENIED**. His Motion for Summary Judgment on those grounds is likewise **DENIED**.

5. A Certificate of Appealability is **DENIED** with respect to the claims rejected by this Court.

Signed at Houston, Texas, on _____,
2003.

_____
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOWARD PAUL GUIDRY, Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. H-01-4140
	§	JUDGE VANESSA
	§	GILMORE
DOUG DRETKE, Director, Texas Department of Criminal Justice,Correctional Institutions Division, Respondent.	§	

FINAL JUDGMENT

In accordance with the Court's Order of even date, Petitioner Howard Paul Guidry's Petition for Writ of Habeas Corpus is provisionally **GRANTED** with respect to his claims involving his confession and the hearsay testimony given at trial. Respondent Janie Cockrell, Director, Director, Texas Department of Criminal Justice, Institutional Division, shall release Petitioner Howard Paul Guidry from custody unless within 180 days the State of Texas conducts a new trial which suppresses these statements which this Court has found to be constitutionally defective in accordance with the findings of the Court's Order. With the exception of the aforementioned issues, Petitioner Howard Paul Guidry's Petition for Writ of Habeas Corpus is **DENIED.** This Court **DENIES** a Certificate of Appealability.

This is a final judgment.

Signed at Houston, Texas on September 25, 2003.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE